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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CHARLES THOMAS CORN,

Petitioner,

v.

WALTER ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER THE COURT'S INSTRUCTIONS TO THE JURY AT PETITIONER'S TRIAL FOR MURDER IMPERMISSIBLY SHIFTED THE BURDEN OF PROOF TO THE PETITIONER AS TO THE ESSENTIAL ELEMENTS OF INTENT AND MALICE.

(A) THE HOLDING OF THE COURT BELOW IS IN DIRECT CONFLICT WITH THE HOLDING OF THIS COURT IN SANDSTROM v. MONTANA, 442 U.S. 510 (1979).

(B) THE COURT SHOULD GRANT CERTIORARI IN THIS CASE IN ORDER TO CLARIFY TWO CRUCIAL AMBIGUITIES IN CONNECTICUT v. JOHNSON, ___ U.S. ___, 103 S.Ct. 969 (1983). DOING SO WILL ALSO PERMIT THIS COURT TO RESOLVE A SIGNIFICANT SPLIT IN THE LOWER COURTS CONCERNING THE MEANING OF SANDSTROM v.MONTANA.

(C) REVIEWING THE INSTRUCTIONS IN THEIR ENTIRETY CLEARLY INDICATES THAT THE INSTRUCTIONS ARE VIRTUALLY INCOMPREHENSIBLE, THUS NOT ONLY VIOLATING SANDSTROM'S MANDATE FORBIDDING INSTRUCTIONS THAT COULD BE INTERPRETED AS SHIFTING THE BURDEN OF PERSUASION, BUT ALSO VIOLATING DEFENDANT'S DUE PROCESS RIGHT TO COMPREHENSIBLE JURY INSTRUCTIONS. THIS COURT SHOULD GRANT CERTIORARI TO VINDICATE DEFENDANT'S SANDSTROM RIGHTS AND HIS RIGHT TO COMPREHENSIBLE JURY INSTRUCTIONS.

(D) THE AREA OF CONSTITUTIONAL BURDEN OF PROOF REQUIREMENTS IS IN NEED OF ATTENTION BY THIS COURT DUE TO ITS AMBIGUITY AS PERCEIVED BY THE LOWER COURTS.

(E) THIS COURT HAS RECENTLY GRANTED CERTIORARI IN KOEHLER v. ENGLE, #83-1. THE PRESENT CASE RAISES SIMILAR ISSUES, BUT IS INCONSISTENT WITH THE OPINION BELOW IN KOEHLER. ACCORDINGLY, THIS COURT SHOULD GRANT CERTIORARI AND SET THIS CASE FOR ARGUMENT WITH KOEHLER.

II. WHETHER PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS APPOINTED TRIAL COUNSEL FAILED TO PRESENT AT THE SENTENCING PHASE OF TRIAL, CRITICAL, AVAILABLE EVIDENCE IN MITIGATION OF SENTENCE.

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Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (Unit B en banc), cert. granted, ___ U.S. ___, 103 S.Ct. 2451 (1983)	15
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28 U.S.C. §1254	1
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OTHER AUTHORITY

Allen, "Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices", 94 Harv. L. Rev. 321 (1980)	15
Nesson, "Rationality, Presumptions, and Judicial Comment: A Response to Professor Allen", 94 Harv. L. Rev. 1574 (1980)	15
Schmolesky," County Court of Vester County v. Allen, and Sandstrom v. Montana: The Supreme Court Lends an Ear but Turns Its Face", 33 Rutgers L. Rev. 261 (1981)	15
Jefferies & Stephan, "Defense, Presumptions, and Burden of Proof in the Criminal Law", 88 Yale L. J. 1325 (1979)	15
Lushing, "Faces Without Features: The Surface Validity of Criminal Inferences", 72 J.C. & Crim. 82 (1981)	15
Allen and DeGrazia, "The Constitutional Requirement of Proof Beyond Reasonable Doubt in Criminal Cases: A Comment Upon Incipient Chaos in the Lower Courts", 20 Am. Crim. L. Rev. 1 (1982)	15

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Appendix "A", pp. 1A-26A) is reported in Corn v. Zant, 708 F.2d 549 (11th Cir. 1983).

The Order of the Eleventh Circuit Court of Appeals denying rehearing en banc is attached as Appendix "B".

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1), Petitioner having asserted below and asserts in this Court deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States.
2. This case also involves the following provisions of the Georgia Code, the texts of which are set out in Appendix "C" hereto:

   Ga. Code Ann. §26-1101(a); OCGA §16-5-1(a)

   Ga. Code Ann. §27-2534; OCGA §17-10-30

HOW THE ISSUES WERE RAISED BELOW

Each of the constitutional issues in the Questions Presented were raised by petition for writ of habeas corpus in the district court and raised on appeal to the United States Court of Appeals for the Eleventh Circuit.

STATEMENT OF THE CASE

Petitioner, Charles Thomas Corn, was convicted of malice murder and armed robbery in the Superior Court of Clayton County, Georgia on May 26, 1976. At the separate sentencing proceeding, conducted immediately after the guilt/innocence phase of trial, Petitioner was sentenced to death on each count.

On direct appeal, the Supreme Court of Georgia affirmed the convictions and the death sentence for murder; the death sentence imposed for armed robbery was reversed and remanded to the trial court for imposition of a sentence less than death. Corn v. State, 240 Ga. 130, 240 S.E.2d 694 (1977), cert. denied 436 U.S. 914 (1978).

Petitioner unsuccessfully pursued a petition for writ of habeas corpus in the Superior Court of Tattnall County, Georgia. The denial of habeas corpus relief was affirmed by the Supreme Court of Georgia. Corn v. Hopper, 244 Ga. 28, 257 S.E.2d 533 (1979).

Petitioner then filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. §2254, in the United States District Court for the Northern District of Georgia, Atlanta Division. The matter was referred to a United States Magistrate who conducted an evidentiary hering on June 17, 1980. The United States Magistrate entered his Report and Recommendation on December 3, 1980, in which he recommended that the Writ of Habeas Corpus be granted based upon the burden-shifting jury instruction (Issue I in this Petition).

The District Court refused to follow the magistrate's recommendation concerning the jury instructions; however, the District Court granted the Writ as to Petitioner's sentence of death based on an improper comment concerning appellate review made by the trial court to the jury during the sentencing phase of trial.

An appeal and cross-appeal were taken to the United States Court of Appeals for the Eleventh Circuit. A panel of that court reversed the District Court's grant of the Writ of Habeas Corpus and affirmed the District Court in all other respects, thus denying relief to Petitioner on all issues presented. Corn v. Zant, 708 F.2d 549 (11th Cir. 1983). Rehearing en banc was denied by the Eleventh Circuit on August 11, 1983.

Petitioner's convictions and sentence of death arise from his robbery of a convenience store in Clayton County, Georgia and the killing of an employee of the convenience store.

Petitioner pleaded not guilty by reason of insanity. His court appointed trial counsel had never previously participated in a capital trial nor had he employed an insanity defense at any criminal trial.

At the guilt/innocence phase of trial, Petitioner's trial counsel presented only the testimony of one psychiatrist whose testimony was narrowly directed to whether or not Petitioner knew the difference between right or wrong at the time of the crime. None of Petitioner's extensive history of severe psychiatric problems was presented at either phase of trial. [1]

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1. Petitioner's extensive history of psychiatric problems was documented at the evidentiary hearing before the United States Magistrate. Included in this material was a psychological evaluation conducted by Dr. Thomas E. Butcher. His report concluded:

> Charles [Petitioner] is a thin, tremulous, dissheveled young man initially extremely anxious, stumbling in his presentation of the events leading to his arrest but eventually saying as much as he could recall of what happened.
>
> The Wechsler Adult Intelligence Scale yields a Full Scale I.Q. of 68 indicating mental defective intellectual functioning. There is an intellectual deterioration here of 14 percent which is considerably larger than the zero deterioration expected at this chronological age level. In addition we find a reading grade level of 1.7 suggesting that Charles has not been able to absorb school

At the sentencing phase of trial, no evidence in mitigation of sentence was presented, save the testimony of Petitioner's mother.

[footnote 1 continued]

> material and the school history he relates is that he could learn fairly effectively for the first few grades and then was unable to absorb any more material. We see here then a person with limited adaptive capacity, one whom the stress of life would affect much greater than someone with higher adaptive capacity. Additionally, Charles does not have the intellectual reserve with which to face stressful situation.
>
> The Memory for Designs suggests central nervous system disorder, lapses in perceptual motor coordination, peripheral uncoordination.
>
> The projective techniques show a severe psychosis, loss of identity, anamism, very low integrative capacity, a forboding sense of his life having been shattered, lapses of concentration and memory and very weak reality testing.
>
> The projective material is entirely consistent with Charles' description of the events surrounding his difficulties, it is clear that he has been in the midst of a deep psychosis, would be subject to periods of total lack of awareness of where he was or who he was or what he was doing.
>
> The diagnostic impression is one of schizophrenic reaction, schizo-affective type with paranoid elements and central nervous system dysfunction.

REASONS FOR GRANTING THE WRIT

I.

(A) THE HOLDING OF THE COURT BELOW IS IN DIRECT CONFLICT WITH THE HOLDING OF THIS COURT IN SANDSTROM v. MONTANA, 442 U.S. 510 (1979).

In Sandstrom v. Montana, this Court held that the Due Process Clause of the Fourteenth Amendment was violated by a jury instruction that "the law presumes that a person intends the ordinary consequences of his acts" because such an instruction could have been interpreted by the jury either to direct a verdict on the issue of intentionality or to shift the burden of proof on it to the defendant, 442 U.S. at 512. In the case at hand, the State of Georgia was required to prove, among other matters, that the defendant committed the act intentionally, and that he committed the act with malice. The trial court gave the following instructions[2] on these issues that unmistakenly could have been interpreted to shift the burden of proof to the defendant:

> On intentionality: "A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. If such person uses a weapon in a manner in which such weapon is ordinarily employed to produce death and thereby causes the death of a human being, the law presumes the intent to kill." (T. Trial pp. 992-993);
>
> On malice: "The law presumes every intentional homicide to be malicious until the contrary appears from circumstances of alleviation and justification, mitigation or excuses." (T. Trial p. 991).

Both of these instructions contains the language crucial to the holding in Sandstrom, "the law presumes," and both deal with an element that the state was required to prove beyond reasonable doubt. Moreover, with respect to both of these presumptions,

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2. The complete instructions on intent given at Petitioner's trial are set forth in the Appendix to the Eleventh Circuit's decision (Appendix "A" to this Petition).

further instructions informed the jury that these presumptions may be "rebutted." The term "rebutted" is not defined, however, thus leaving it to the jury to speculate what is required to "rebut" the presumptions of malice and intentionality. As a result, like the Sandstrom instruction, each instruction could be interpreted as shifting a burden of persuasion to the defendant. Thus, not only did the instructions violate this Court's holding in Sandstrom, they did so twice consecutively in a set of interlocking instructions that relieved the State of its obligation to prove every element of the offense beyond reasonable doubt.

The court below avoided this obvious conclusion by asserting that "the Court does not scrutinize discrete portions of the charge but must evaluate it in its entirety . . ." 708 F.2d at 558-59, and that the instruction as a whole contained enough qualifying language to avoid the holding in Sandstrom. Even if the instructions are viewed as a whole, however, the instant instructions are a clear violation of the principles underlying Sandstrom. To be sure, there is qualifying language in Corn (e.g., "this presumption may be rebutted") T. Trial at 993, 995, but there is qualifying language in Sandstrom as well, [e.g., the jury "must be convinced beyond reasonable doubt . . . that the defendant caused the death of (the victim) purposely or knowingly"] Petition for Writ of Certiorari Appendix at 34-35. There are other critical similarities between the instructions in the two cases. Both instructions refer to the presumption of innocence the same number of times. In fact, in Sandstrom, the jury was instructed that the presumption of innocence "has the weight and effect of evidence in the defendant's behalf", which appears to be quite beneficial to the defendant. Id. Moreover, both discuss the state's burden of proving the elements of the crime beyond reasonable doubt. Both use the word "presume"

throughout the instructions. Indeed, in Sandstrom, "presume" was used four times, and in Corn it was used no less than nineteen times. Finally, both instructions failed to define the word "presumption" and failed to articulate any standard for applying the presumption. Thus, even looking at the instructions in their entirety, they are in obvious conflict with this Court's decision in Sandstrom v. Montana.

(B) THE COURT SHOULD GRANT CERTIORARI IN THIS CASE IN ORDER TO CLARIFY TWO CRUCIAL AMBIGUITIES IN CONNECTICUT v. JOHNSON, ___ U.S. ___, 103 S.Ct. 969 (1983). DOING SO WILL ALSO PERMIT THIS COURT TO RESOLVE A SIGNIFICANT SPLIT IN THE LOWER COURTS CONCERNING THE MEANING OF SANDSTROM v. MONTANA.

In Connecticut v. Johnson, ___ U.S. ___, 103 S.Ct. 969 (1983), this Court issued a judgment affirming a decision of the Supreme Court of Connecticut in order to resolve a conflict in the lower courts concerning the nature of harmless error analysis as applied in the Sandstrom context. ___ U.S. at ___, 103 S.Ct. at 971. This Court did not resolve that conflict, however. Four members of the Court concurred in the plurality decision, but four dissented, and the ninth justice concurred specially in the judgment. Therefore, the split in the lower courts that gave rise to Johnson remains unresolved. See, e.g., Engle v. Koehler, 707 F.2d 241, at 246 (6th Cir. 1983) cert. granted, ___ U.S. ___, 52 U.S.L.W. 3279 (1983) (citing Connecticut v. Johnson and commenting "the Supreme Court has not supplied clear guidance on this question").

The present case is a peculiarly apt vehicle for resolving this issue. Although the court below did not rely specifically on harmless error, it appears obvious that the court's judgment was heavily influenced by its view of the strength of the evidence against the defendant. 708 F.2d at 564-567.

More important, this case in addition presents a vehicle for resolving another ambiguity concerning harmless error analysis that has generated yet another split in the circuits. Johnson dealt with whether a conviction may ever be affirmed if there is a Sandstrom violation in the the instructions. The related question that needs to be resolved is whether any curative instructions can rectify the harm done by an instruction to the effect that "the law presumes intent."

In this case, the court below found that curative instructions did cure the Sandstrom error..[3] In Sandstrom, though, this Court suggested that curative instructions most likely could not offset the harm engendered by "the law presumes" instructions. 442 U.S. at 518-19, n.7. However, the lack of clear guidance on that point has generated another split in the lower courts in need of resolution. In Burton v. Bergman, 649 F.2d 428 (1981), the Sixth Circuit held that the use of the word "presume" is unconstitutional under Sandstrom because of its mandatory tone, while the Eleventh Circuit in the present case held that the word "presume" or its derivations may be employed in instructions. Moreover, these two cases are merely representative of the great difficulty the lower courts are having in determining how to apply Sandstrom to jury instructions.[4] Thus, this Court should grant certiorari in order to give further guidance to the lower courts on this important matter.

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3. Indeed, a more complete analysis of the jury instructions demonstrates how contradictory and confusing the instructions as a whole. See Part C, infra. Indeed, as is pointed out in Part C, infra, the instructions relied on by the Court below to "cure" the Sandstrom error exacerbated it.

4. Other courts have held, for example, that "curative language" exacerbates rather than ameliorates the constitutional problems. See, e.g., Dietz v. Solem, 640 F.2d 126 (8th Cir. 1981); Baker v. Munay, 619 F.2d 327 (4th Cir. 1980).

(C) REVIEWING THE INSTRUCTIONS IN THEIR ENTIRETY CLEARLY INDICATES THAT THE INSTRUCTIONS ARE VIRTUALLY INCOMPREHENSIBLE, THUS NOT ONLY VIOLATING SANDSTROM'S MANDATE FORBIDDING INSTRUCTIONS THAT COULD BE INTERPRETED AS SHIFTING THE BURDEN OF PERSUASION, BUT ALSO VIOLATING DEFENDANT'S DUE PROCESS RIGHT TO COMPREHENSIBLE JURY INSTRUCTIONS. THIS COURT SHOULD GRANT CERTIORARI TO VINDICATE DEFENDANT'S SANDSTROM RIGHTS AND HIS RIGHT TO COMPREHENSIBLE JURY INSTRUCTIONS.

A defendant in a criminal case has a Due Process right to comprehensible jury instructions.[5] Moreover, this Court's holding in Sandstrom mandates comprehensible jury instructions on elements of the offense that the state must prove beyond reasonable doubt. This is so because of Sandstrom's holding that if a reasonable juror could interpret a jury instruction as directing a verdict or as shifting a burden of persuasion, than the instruction is constitutionally invalid. Obviously, a reasonable juror could so "interpret" an incomprehensible instruction, because by hypothesis the instruction is incapable of being rationally understood to carry a certain meaning.

Contrary to the ruling of the Eleventh Circuit in this case, the relevant jury instructions are not "fair and balanced in both tone and content" 708 F.2d at 560. Rather, they are virtually incomprehensible at crucial points dealing with elements of the offense. The following passage indicates this quite well:

> The law presumes every intentional homicide to be malicious until the contrary appears from circumstances of alleviation and justification, mitigation or excuse. The accused may show such circumstances to the Jury unless such circumstances appear from the evidence produced against the accused.

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5. See, e.g., Agnew v. United States, 165 U.S. 36, 52 (1897) (a charge should not be misleading); Bollenbach v. United States, 326 U.S. 607, 615 (1946) (Conviction should not rest on ambiguous and equivocal instructions to the jury on a basic issue); Polansky v. United States, 332 F.2d 233, 236 (1st Cir. 1964) (jury should not be required to determine which part of a contradictory charge is correct). See also, United States v. Bagby, 451 F.2d 920 (9th Cir. 1971).

> But he is not required to do so. If such evidence produced against the accused, if there be such, discloses the homicide was done without malice, then this presumption that the homicide is malicious does not exist. If, however, the evidence produced against the accused, if there be such, does not disclose that the killing was done without malice, the accused may show that it was done without malice. But he is not required to do so.
>
> I charge you, however, that this presumption which arises against the slayer where an intentional homicide is shown does not arise against the slayer unless it be first shown to a moral and reasonable certainty and beyond a reasonable doubt that the Defendant was the intentional slayer. When and if a killing is proved to your satisfaction to be the intentional act of the Defendant himself the presumption of innocence with which he enters upon the trial is removed from him. But as I charged you heretofore, the evidence of justification or mitigation may be found in the evidence produced against him. If there be no evidence introduced against him to show justification or mitigation and if the evidence introduced shows the homicide to have been committed as charged in the indictment, the Defendant may, but is not required to, show mitigation or excuse. (T. Trial pp. 991-92).

All language contains ambiguity, but consider just the obvious deficiencies of this portion of the instruction. In the first paragraph, the word "presumes" is employed but not defined here or elsewhere. How is the jury to know what it means? In the same paragraph, the instruction says that the "accused may show" mitigating circumstances but "he is not required to do so." Nowhere is the phrase "may show" defined. What standard does the defendant have to meet to satisfy this phrase? If the State's argument is that the defendant does not have to meet <u>any</u> standard, then what is the point of the instruction? If the defendant produces no evidence, the previous sentence tells the jury that "The law presumes every intentional homicide to be malicious." Thus, if the defendant fails to produce evidence,

the jury apparently is instructed to convict, which again is an obvious violation of the defendant's rights. The same problem infects the last two sentences of the paragraph.[6]

The second paragraph reflects the problem just described but has a further difficulty as well that highlights that problem. The last sentence informs the jury that "if the evidence introduced shows the homicide to have been committed as charged in the indictment, the Defendant may, but is not required to, show mitigation or excuse." But, the State has to "show" things beyond reasonable doubt; could a "reasonable" juror conclude that if that is what "to show" means, then the defendant has "to show" "mitigation or excuse" beyond reasonable doubt? Obviously so.

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6. It is instructive to compare this instruction with the trial court's instruction on insanity:

> I charge you that the question of whether or not the Defendant has successfully rebutted the presumption of sanity in this case is for you to decide. It is not necessary that the Defendant introduce evidence of his insanity sufficient to convince you beyond a reasonable doubt, but rather it is only necessary for him to introduce some competent evidence of his insanity. And when he has done this, the burden shifts to the State to prove his sanity beyond a reasonable doubt. Under Georgia law, a person will not be presumed to act with criminal intent but the triers of the facts, the Jurors, may find such intention or the absence thereof upon consideration of the words, conduct, demeanor, motive, evidence of sanity or insanity and all other circumstances connected with the acts for which the accused is prosecuted.

Here the trial court does define the defendant's burden as "some evidence." That definition can only generate more confusion in those sections of the instructions lacking such definitions. If this "presumption" may be "rebutted" by "some evidence," it would be rational to assume that the other "presumptions" that are not so qualified cannot be rebutted in the same fashion. Were that not the case, it is rational to conclude, the jury would have been so instructed. The confusion generated by these instructions is obvious.

There is one further passage from the jury instructions to consider that highlights the general incomprehensibility of the instructions:

> I charge you that the acts of a person of sound mind and discretion are presumed to be the product of a person's will, but this presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. If such person uses a weapon in a manner in which such weapon is ordinarily employed to produce death and thereby causes the death of a human being, the law presumes the intent to kill. However, this presumption may be rebutted. A person will not be presumed to act with criminal intention, but the trier of the facts, and that is you, the jury, in this case, may find such intention upon consideration of the words, conduct, demeanor and motive, if any, and all facts and circumstances connected with the act for which the accused is prosecuted.

This instruction informs the jury that "the acts of a person of sound mind and discretion are presumed to be the product of a person's will," that "A person of sound mind and discretion is presumed to intend the natural and probable consequences of his act," and that under the specified circumstances, "the law presumes the intent to kill." Having just informed the jury three times in a single paragraph that "the law presumes" intent, the instruction then says "A person will not be presumed to act with criminal intention . . ." With all due respect, it is impossible for juries to make any sense of this at all. This paragraph, dealing with the crucial element of intentionality, is simply self-contradictory.

Ironically, the extent of the confusion generated by these instructions is revealed in the opinion of the court below. After quoting various portions of the above instructions, the Eleventh Circuit asserts that what the instructions mean is that "At most, there was a permissible inference that the defendant

could, if he so chose, introduce mitigating evidence." 708 F.2d at 559 (emphasis supplied, footnote omitted). This explanation must be in error, however, for there is no reason why the trial court would be instructing the jury on "a permissible inference" that the defendant is permitted to "introduce mitigating evidence". Of course the defendant may produce mitigating evidence; there is no "inference" here to be drawn by the jury. The jury's concern is to draw inferences about the historical facts, not about the defendant's right to "if he so chose, [to] introduce mitigating evidence."

Obviously, the instructions even confused the court below. And not surprisingly so. The instructions taken as a whole are virtually incomprehensible at crucial points. This ought not to be allowed in any criminal case, but particularly not one where a person is on trial for his or her life. This is especially so because the kind of confusion reflected in these instructions is entirely gratuitous and could be eliminated quite simply.[7] This Court should grant certiorari to vindicate this defendant's right to clear and comprehensible jury instructions on elements that the state must prove beyond reasonable doubt.

(D) THE AREA OF CONSTITUTIONAL BURDEN OF PROOF REQUIREMENTS IS IN NEED OF ATTENTION BY THIS COURT DUE TO ITS AMBIGUITY AS PERCEIVED BY THE LOWER COURTS

Ever since this Court first held that proof beyond reasonable doubt is constitutionally required, the lower courts have been engaged in an effort to determine the scope of the requirement. Notwithstanding the continuing efforts by this Court to clarify matters, the perception in the lower courts is that the scope of the requirement of proof beyond reasonable

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7. For discussion, see authorities cited in n. 8, infra.

doubt is very unclear. Indeed, one can find inconsistent decisions on virtually every aspect of the proof process. For example, compare, Carter v. Jago, 637 F.2d 449 (6th Cir. 1980) (self-defense is an affirmative defense; therefore the defendant must prove it by a preponderance of the evidence) with Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980) cert. denied, 451 U.S. 1028 (1981) (self-defense negates the unlawfulness element of murder; therefore the state must disprove its existence); Mancuso v. Harris, 677 F.2d 206 (2nd Cir. 1982) (language condemned in Sandstrom permissible here because preceded and followed by qualifying language) with Dietz v. Solem, 640 F.2d 126 (8th Cir. 1982) (even with qualifying language, instruction still unconstitutional under Sandstrom); Jacks v. Duckworth, 651 F.2d 480 (7th Cir. 1981) (burden shifting tendency of instruction cured by general instruction on the state's burden of proof and that the jury must consider instructions as a whole) with Dietz v. Solem, 640 F.2d 126 (8th Cir. 1981) (burden shifting or conclusive presumption is type of presumption contemplated in Cupp v. Naughten as constitutional error by itself); Burton v. Bergman, 649 F.2d 428 (6th Cir. 1981) (use of word "presume" unconstitutional under Sandstrom because it gives mandatory tone to instruction) with Wilson v. Zant, 249 Ga. 373, 290 S.E.2d 442 (1982) (presumption permissible despite word "presume" because jury told it may infer or presume intent"); Burton v. Bergman, 649 F.2d 428 (6th Cir. 1981) (Sandstrom retroactive because it raises serious questions about accuracy of guilty verdicts in past trials) with Pigee v. Israel, 503 F.Supp. 1170 (E.D. Wis. 1980) (Burden on criminal justice system, witnesses and families of victims compels that Sandstrom not be retroactively applied).

The view of the commentators is consistent with that of the lower courts. Virtually every scholar who has written in this general area has remarked on the tremendous ambiguity generated by the relevant precedents.[8] This ambiguity reflected by the lower courts and the commentators comes at a tremendous cost, since burden of proof problems affect virtually every criminal trial. Thus, this Court should grant certiorari in this case to help bring badly needed clarity to this important area.

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8. See, e.g., Allen, Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices, 94 Harv. L. Rev. 321, 322 (1980) ("profusion of contradictory theories and results" in constitutional burden of proof cases); Nesson, Rationality, Presumptions, and Judicial Comment: A Response to Professor Allen, 94 Harv. L. Rev. 1574 ("reconciling the use of evidentiary devices . . . with the constitutional requirement of proof beyond reasonable doubt has been a persistent problem for courts . . ."). See also, Schmolesky, County Court of Vester County v. Allen, and Sandstrom v. Montana: The Supreme Court Lends an Ear but Turns Its Face, 33 Rutgers L. Rev. 261 (1981); Jefferies & Stephan, Defense, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L. J. 1325, 1335 (1979); Lushing, Faces Without Features: The Surface Validity of Criminal Inferences, 72 J.C. & Crim. 82 (1981); Allen and DeGrazia, The Constitutional Requirement of Proof Beyond Reasonable Doubt in Criminal Cases: A Comment Upon Incipient Chaos in the Lower Courts, 20 Am. Crim. L. Rev. 1 1982).

(E) THIS COURT HAS RECENTLY GRANTED CERTIORARI IN KOEHLER v. ENGLE, #83-1. THE PRESENT CASE RAISES SIMILAR ISSUES, BUT IS INCONSISTENT WITH THE OPINION BELOW IN KOEHLER. ACCORDINGLY, THIS COURT SHOULD GRANT CERTIORARI AND SET THIS CASE FOR ARGUMENT WITH KOEHLER.

In Koehler v. Engle, 707 F.2d 241, the Sixth Circuit reviewed a set of trial instructions in a trial for murder to the affect that the law provides "a rule of thumb" that a person i presumed to intend the natural consequences of his acts," and that "malice is implied from any deliberate and cruel act against another person," Id. at 243. The Sixth Circuit found that these instructions violated Sandstrom, regardless of the presence of other curative instructions. Moreover, the Sixth Circuit stated that such instructions "can be extremely prejudicial even if overall proof of intent or malice is substantial," Id. at 246, and thus declined to find the error harmless.

The present case presents very similar issues to those in Koehler. The instructions are similar, and each case possesses attempted curative instructions. In the present case, however, the Eleventh Circuit affirmed the conviction, and thus it is inconsistent with Koehler. Accordingly, the Court should grant certiorari in the present case and set it for argument with Koehler in order to resolve the inconsistency between the decision of the Eleventh Circuit and that of the Sixth Circuit. Doing so will also provide a felicitous vehicle for the Court to provide the lower courts guidance on the meaning of Sandstrom.

II.

PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS APPOINTED TRIAL COUNSEL FAILED TO PRESENT AT THE SENTENCING PHASE OF TRIAL, CRITICAL, AVAILABLE EVIDENCE IN MITIGATION OF SENTENCE.

This Court has granted certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (Unit B en banc), cert. granted, ___ U.S. ___, 103 S.Ct. 2451 (1983). The Fifth Circuit's decision concerns the standard for the effective assistance of counsel in a capital trial where the defendant faces the penalty of death.

Petitioner's case similarly raises serious questions concerning the quality of representation afforded to Petitioner by his court appointed attorney, especially at the critical sentencing phase of the proceedings.

Prior to the date of the offense, Charles Corn had a long history of mental illness.[9] He had been in and out of hospitals for psychiatric treatment, and examined over the course of years by several different psychiatrists. (T. Tr. p. 1048; T. Fed. Hab. p. 133).

Before trial, one psychiatrist and a psychologist were appointed by the court to examine Mr. Corn. The psychiatrist, Dr. Miguel Bosch, concluded that Mr. Corn was sane and testified

9. The nature and extent in time and severity of Mr. Corn's mental problems is documented by hospital and mental health facility records introduced in the district court, including medical records from Tampa [Florida] General Hospital, Georgia Baptist Hospital, Clayton County [Georgia] Mental Health Center, and psychiatric reports from Dr. Thomas E. Butcher and Dr. Kirk M. Lolar. See Petitioner's Fed. Hab. Exhibit 1, T. Fed. Hab. p. 165. These records clearly show the extensive documented evidence of Mr. Corn's mental condition that trial counsel failed to present to the jury by testimony or by the medical records.

for the State. Petitioner's trial attorneys retained a psychologist and a psychiatrist. The psychiatrist, Dr. William Sapp, testified for the defense only at the guilt/innocence phase of trial that Mr. Corn was insane. The psychologist did not testify, nor was his report used. No medical testimony was offered at the sentencing phase of the trial.

The psychiatric testimony which was offered on the issue of guilt or innocence was narrowly directed toward determining whether or not Mr. Corn knew the difference between right or wrong at the time of the alleged crime. (T. Tr. pp. 848-50, T. Fed. Hab. pp. 13-14). The testimony barely touched the broad range of psychiatric issues relevant to sentencing, involving Mr. Corn's particular background and all his psychiatric, educational and emotional troubles.

Not only was the testimony of the doctors confined to the modified Georgia McNaughten test of insanity,[10] it was further restricted by hearsay objections which prevented Dr. Sapp from testifying at the guilt/innocence phase of trial on the contents of psychiatric reports obtained from hospitals in Florida and North Carolina. (T. Tr. pp. 857-59). This evidence of Petitioner's prior hospitalization, even if properly excluded on the issue of guilt or innocence, would certainly, if offered, have been relevant to sentencing. Under Green v. Georgia, 442 U.S. 95 (1978), hearsay may be admitted at the capital sentencing hearing to facilitate the inquiry into mitigating factors.

There is no question that evidence of long term mental illness constitutes a mitigating factor which should be considered by the jury prior to imposition of sentence in a capital case. See Eddings v. Oklahoma, 455 U.S. 104, 116 (1982).

Despite the importance of mental illness as a mitigating factor in Petitioner's case, and despite the wealth of available

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10. Ga. Code Ann. §26-702, §26-703; OCGA §16-3-2, §16-3-3.

evidence of his long term mental problems, the trial attorney produced only one witness in mitigation, Mr. Corn's mother who testified briefly on her impressions of his life and mental state. (T. Tr. p. 1044).

The trial attorney did not submit any medical reports in evidence or offer any medical testimony at the sentencing phase of trial. This, despite the availability of voluminous psychiatric records from facilities where Petitioner had obtained treatment. (See Petitioner's Exhibit 1) (T. Fed. Hab. p. 165). The trial attorney did not call any of the professional mental health witnesses, despite the availability of at least four professionals, the two hired by the defense and the two appointed by the court, all of whom could have presented mitigating evidence. (Petitioner's Exhibit 1)
(T. Fed. Hab. p. 165). Dr. Miguel Bosch, the psychiatrist called by the prosecution at the guilt/innocence phase, specifically wrote in his psychiatric report that his diagnosis of Charles Corn was a mitigating factor on the issue of sentencing. (T. Fed. Hab. p. 105). Certainly testimony in mitigation from the State's expert witness would have impressed a jury; unfortunately, the jury did not hear this evidence.

At the evidentiary hearing before the United States Magistrate, Petitioner's trial attorney, a hostile witness, conceded that there was no conceivable strategic reason not to call the available mental health professionals to testify at the sentencing hearing. (T. Fed. Hab. p. 83). It follows as a matter of common sense that if mental illness is the defense theory of mitigation, there can be no valid strategic reason not to present strong evidence in support of the theory. The trial attorney admitted that Dr. Sapp was a strong witness (T. Fed. Hab. p. 90). Dr. Bosch, whose views had been adopted by the State at the guilt/innocence trial, would have been a persuasive witness to

develop the mitigating evidence on Charles Corn's behalf. The psychologist, Dr. Thomas Butcher (see footnote 1, supra), would have been even better.

The record in this case clearly indicates that the evidence which was neglected strongly mitigated against the imposition of the death penalty. The record further indicates that the jury's decision on sentence was close. During its deliberations on sentence, the jury returned to question the trial court as follows:

> MR. FOREMAN: Yes, Your Honor. There seems to be a little misunderstanding in our minds as to the question that has arose as to the death penalty. The Jury would like to know providing the death penalty is issued, would the person be eligible for parole or in a case be--I believe the way the Court put it, death by electric chair or death by imprisonment--I may not exactly have worded it so you can understand it.
>
> THE COURT: I think what I told you was as to the offense of murder, there are two penalties provided by law. One is by death by electrocution, should you find at least one statutory aggravating circumstance as related to you existed. You may then if you desire to do so find the death penalty and enumerate the circumstance or circumstances you find. Or the other penalty is life imprisonment.
>
> Now, does that answer your question?
>
> JUROR RAINWATER: As to parole --
>
> THE COURT: As to matters of parole, the Court by law cannot answer any question regarding that matter nor may counsel remark or say anything or comment about that matter. Under the law, this is a matter not for your consideration, as the law so states. And I don't want to be short with you, but that's what the law says. This is not a matter to be considered by the Jury.
>
> MR. FOREMAN: That's what we were having a problem with.
>
> JUROR DRATON: Yes, Your Honor, if the death penalty is invoked, does that automatically mean that the Defendant will be placed in the electric chair?

THE COURT: I don't know how to answer that, except I will say this. In the event that there is a death penalty, the law provides for mandatory appeal and the case must be appealed by law. And if upon affirmance by the higher court, then the matter is as it is provided by law. I hesitate to say much more to you because for fear that I may make some judicial error in the case and I can only tell you that I've already told you about as much as I can under the law.

Now, is there anything else bearing on your mind?

JUROR RANDALL: One thing that's been going through our minds is if we invoke the death penalty and that specifies the electric chair, can you as the overriding judge right now say, come in and say that he's going to get the electric chair or that he can have death by prison or life imprisonment? That he is to die in prison and never to get out?

THE COURT: Now the--

JUROR RANDALL: Could you yourself do that?

THE COURT: The Court by law in this particular case fix and imposes sentence that you provide in your sentence.

I will not change your sentence. I cannot change your sentence.

JUROR RANDALL: That's what we really wanted to know, if you could do that.

THE COURT: The only sentence that I would pass is as I told you if you find no aggravating circumstances in connection with Count One pertaining to armed robbery, then I would set that sentence.

JUROR: Not to repeat yourself, but if we did say life imprisonment, we have no idea about parole at all, right?

THE COURT: That's right. This is something that the Court is not authorized to comment on.

MR. FOREMAN: That's all. Thank you, Your Honor.

(T. Tr. pp. 1076-78).

It is clear that the jury was seriously considering a sentence of life imprisonment for Petitioner. Had the jury known of the severity and extent of Petitioner's prior

psychiatric problems,they certainly would have viewed him with greater sympathy.

The Supreme Court of Georgia, on direct appeal of the convictions and sentence, aptly summarized the paucity of evidence presented on Petitioner's behalf: "[t]he sole witness for the defense was a neuropsychiatrist who testified that Corn had been insane and unaware of his actions on [the date of the offense]." Corn v. State, 240 Ga. at 132.

There is simply no reason, excepting ineffective assistance of counsel, for trial counsel's failure to present the medical evidence at the sentencing phase of Petitioner's trial.

CONCLUSION

For the reasons shown, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that I have served counsel for the opposing party with a copy of the foregoing pleading by placing same in the United States Mail with adequate first-class postage attached thereon addressed to Mr. Michael J. Bowers, Attorney General, State of Georgia, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgia 30334.

This 4th day of November, 1983.

Ronald J. Allen

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CHARLES THOMAS CORN,

Petitioner,

v.

WALTER ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent

APPENDIX TO

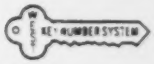
PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

For the reasons stated, we retain jurisdiction and remand for an evidentiary hearing.[15] The district court shall certify its findings and the record of its proceedings on remand to us within 60 days of the issuance of this opinion.

REMANDED WITH INSTRUCTIONS.



Charles Thomas CORN, Petitioner-Appellee, Cross-Appellant,

v.

Walter ZANT, Warden, Jackson Diagnostic and Classification Center, Respondent-Appellant, Cross-Appellee.

No. 81-7649.

United States Court of Appeals, Eleventh Circuit.

June 15, 1983.

Rehearing and Rehearing En Banc Denied Aug. 11, 1983.

State prisoner, who was incarcerated on conviction and death sentence for murder and conviction for armed robbery, filed petition for writ of habeas corpus. The United States District Court for the Northern District of Georgia, Robert L. Vining, Jr., J., granted writ, and appeal and cross appeal were taken. The Court of Appeals, Albert J. Henderson, Circuit Judge, held that: (1) petitioner did not suffer any constitutional deprivation when trial court informed jury of state's automatic appeal rule with regard to death sentences; (2) jury instructions on presumption of intent did not unconstitutionally shift burden of proof to petitioner in violation of due process rights; (3) refusal to provide transcripts of counsel's opening and closing arguments and counsel's failure to order record of opening and closing remarks did not deprive petitioner of effective assistance; (4) evidence of victim's injury and subsequent death more than justified instruction on aggravating circumstance, as prerequisite to imposing death sentence, that jury find there was aggravated battery to victim; (5) it was not constitutional error to rely on right/wrong insanity defense under Georgia law; (6) petitioner had no standing to exclude wife's testimony under interspousal privilege; and (7) introduction of petitioner's confession at trial was not constitutional error.

Affirmed in part, reversed in part and remanded with direction.

1. **Habeas Corpus** ⇐25.1(8)

Federal habeas court does not sit as state appellate court to correct violations of state evidentiary rules. 28 U.S.C.A. § 2254.

2. **Habeas Corpus** ⇐92(1)

It is not role of federal habeas court to analyze every infirmity that might have been reached on direct appeal; rather, inquiry is restricted to those aspects of trial affecting petitioner's federal constitutional rights. 28 U.S.C.A. § 2254.

3. **Habeas Corpus** ⇐25.1(1)

Generally, failure to object precludes subsequent consideration of issue unless defendant can satisfy *Wainwright* cause and prejudice test.

4. **Habeas Corpus** ⇐25.1(4)

Where state court does not rely on procedural default in its decision on appeal of conviction, but reaches merits of issue, federal habeas court may review substan-

teenth Amendment's due process clause; and (3) whether the trial court's sentencing instructions adequately informed the jury as to its duty to consider mitigating circumstances.

15. Petitioner is "entitled to careful consideration and plenary processing" of his claims "including full opportunity for presentation of the relevant facts." *Harris v. Nelson*, 394 U.S. 286, 298, 89 S.Ct. 1082, 1090, 22 L.Ed.2d 281 (1969). In view of the "demand for speed, flexibility, and simplicity," *Hensley v. Municipal Court*, 411 U.S. 345, 350, 93 S.Ct. 1571, 1574, 36 L.Ed.2d 294 (1973), petitioner shall proceed promptly to expedite the hearing and submit a prompt request for discovery if desired.

tive question, notwithstanding failure of petitioner to object during trial. 28 U.S.C.A. § 2254.

5. Habeas Corpus ⇐25.1(4)

Where state courts reached constitutional issue as to whether state trial judge improperly informed jury of state's automatic appeal rule with regard to death sentences, federal habeas court was not foreclosed from reviewing it, notwithstanding petitioner's failure to object to judge's comments during trial. 28 U.S.C.A. § 2254; Ga.Code, § 27–2537; O.C.G.A. § 17–10–35.

6. Habeas Corpus ⇐45.2(4)

In federal habeas action, petitioner's entitlement to relief had to be predicated on due process grounds although state habeas court, in considering same claim of error, was not required to consider the constitutional impact of the alleged error but confined itself to state law resolutions. 28 U.S.C.A. § 2254.

7. Constitutional Law ⇐270(1)

Defendant did not suffer any constitutional deprivation when state trial judge informed jury of state's automatic appeal rule with regard to death sentences, viewing remark in light of whole sentencing procedure, where there was no indication that mere knowledge of petitioner's potential appeal diminished jury's sense of responsibility for its sentence. 28 U.S.C.A. § 2254; Ga.Code, §§ 26–3102, 27–2537; O.C.G.A. §§ 17–10–31, 17–10–35; U.S.C.A. Const.Amend. 14.

8. Criminal Law ⇐790

No rule requires that jury be kept totally ignorant of appellate process.

9. Homicide ⇐231

Under Georgia law, malice, either express or implied, is essential element of murder and must be established by prosecution beyond reasonable doubt. Ga.Code, § 26–1101; O.C.G.A. § 16–5–1.

10. Habeas Corpus ⇐92(1)

In examining instructions on presumption of intent for possible constitutional infirmity, federal habeas court had to determine whether reasonable jury might have failed to understand, from entire charge, that there was rebuttable presumption of intent or malice and that they were free to weigh all evidence. 28 U.S.C.A. § 2254; Ga.Code, § 26–1101; O.C.G.A. § 16–5–1.

11. Constitutional Law ⇐268(11)

In determining whether instructions shifted burden of proof to petitioner in violation of due process clause of Fourteenth Amendment, federal habeas court does not scrutinize discrete portions of charge but must evaluate it in its entirety. 28 U.S.C.A. § 2254; U.S.C.A. Const.Amend. 14.

12. Constitutional Law ⇐268(11)

Jury instructions on presumption of intent, which included language to effect that law presumes every intentional homicide to be malicious until contrary appears, that person of sound mind is presumed to intend natural and probable consequences of his acts, and that law presumes every person to be sane unless it is shown to contrary, did not shift burden of proof to defendant to demonstrate lack of malice in violation of due process rights where instructions were clear that accused "may" show circumstances to negate intent but was not required to do so, instructions were fair and balanced in both tone and content, and untoward effect, if any, was entirely vitiated by statement of state's responsibility to prove intent beyond reasonable doubt. 28 U.S.C.A. § 2254; U.S.C.A. Const.Amend. 14; Ga.Code, § 26–1101; O.C.G.A. § 16–5–1.

13. Constitutional Law ⇐266(7)

Ultimate test in determining whether presumption in criminal case is valid under due process clause of Fourteenth Amendment is that device must not undermine fact-finder's responsibility at trial, based on evidence adduced by state, to find ultimate facts beyond reasonable doubt. U.S.C.A. Const.Amend. 14.

14. Criminal Law ⇐633(1)

Constitution guarantees each defendant a fundamentally fair trial, not a perfect one. U.S.C.A. Const.Amend. 14.

15. **Habeas Corpus** ⇐25.1(6)

Neither trial court's refusal to provide transcripts of nor counsel's failure to order record of opening and closing remarks of counsel at trial deprived defendant of effective assistance of counsel so as to require vacation of death sentence where there was no statutory duty to transcribe arguments of counsel, state appellate court found that death penalty was not imposed under influence of passion, prejudice or any other arbitrary factor, and defendant did not object to any part of opening or closing statements or point to any infirmities during those phases of trial. 28 U.S.C.A. § 2254; Ga. Code, §§ 27-2401, 27-2537(a)-(c)(1); O.C.G.A. §§ 17-8-5, 17-10-35(a)-(c)(1).

16. **Habeas Corpus** ⇐25.1(4)

Absent any showing of harm by petitioner, failure to transcribe counsel's arguments is not constitutional violation requiring vacation of sentence on petition for habeas corpus. 28 U.S.C.A. § 2254; Ga. Code, §§ 27-2401, 27-2537(a)-(c)(1); O.C.G.A. §§ 17-8-5, 17-10-35(a)-(c)(1).

17. **Constitutional Law** ⇐268.2(3)

Where defendant, who alleged that he was deprived of opportunity for fair hearing in that he could not afford cost of transcribing opening and closing remarks of counsel, did not make demand for transcription of arguments of counsel, there was no constitutional error in failure to transcribe. 28 U.S.C.A. § 2254; Ga.Code, §§ 27-2401, 27-2537(a)-(c)(1); O.C.G.A. §§ 17-8-5, 17-10-35(a)-(c)(1).

18. **Criminal Law** ⇐641.13(1)

In determining whether assistance of counsel was ineffective, appropriate inquiry is whether accused was represented by counsel reasonably likely to render and who, in fact rendered reasonably effective assistance. 28 U.S.C.A. § 2254; U.S.C.A. Const. Amends. 6, 14.

19. **Constitutional Law** ⇐268.1(6)

When general due process claim is raised under Fourteenth Amendment, test for constitutionally ineffective assistance of counsel is whether whole proceeding was fundamentally unfair. 28 U.S.C.A. § 2254; U.S.C.A. Const.Amends. 6, 14.

20. **Habeas Corpus** ⇐25.1(6)

In determining whether assistance of counsel was ineffective, federal habeas court determines whether effective service was rendered based on totality of circumstances rather than taking isolated instances out of context. 28 U.S.C.A. § 2254; U.S.C.A. Const.Amends. 6, 14.

21. **Criminal Law** ⇐641.13(1)

Sixth Amendment right to reasonably effective counsel does not mean errorless assistance or counsel judged ineffective by hindsight. U.S.C.A. Const.Amends. 6, 14.

22. **Criminal Law** ⇐641.13(2)

Defendant's counsel was not ineffective for failure to pursue "delusional compulsion" defense in homicide prosecution instead of "right/wrong" insanity defense where defendant insisted that he remembered absolutely nothing about murder. 28 U.S.C.A. § 2254; U.S.C.A. Const.Amends. 6, 14.

23. **Habeas Corpus** ⇐25.1(6)

To warrant grant of habeas corpus on ground of ineffective assistance of counsel, petitioner would have to prove that assistance, even if ineffective, created not only possibility of prejudice but that it worked to his actual and substantial disadvantage. 28 U.S.C.A. § 2254; U.S.C.A. Const. Amends. 6, 14.

24. **Habeas Corpus** ⇐85.5(11)

Petitioner had failed to show that trial counsel's strategic decisions as to whether to pursue certain defenses, file additional motions, and make specific objections so prejudiced him as to violate any constitutionally protected right. 28 U.S.C.A. § 2254; U.S.C.A. Const.Amends. 6, 14.

25. **Homicide** ⇐311

Under Georgia law, evidence that homicide victim's nose and ear cartilage were severed, that her face was cut, that four of many stab wounds punctured her chest and back muscles, reaching her heart, and that victim died from wounds in three

to fifteen minutes, thus suffering pain and disfigurement before dying, more than justified instruction on aggravating circumstance, as prerequisite to imposing death sentence, that jury had to find aggravated battery to victim. Ga.Code, §§ 26–1305, 27–2534.1(b)(2, 4, 7); O.C.G.A. §§ 16–5–24, 17–10–30(b)(2, 4, 7).

26. Homicide ⇐311

Sentencing instructions contained adequate guidelines to lead reasonable juror to fully comprehend duties and choices involved in sentencing procedure and were not constitutionally infirm in instructing jurors of their option to impose life imprisonment instead of death. Ga.Code, § 26–3102; O.C.G.A. § 17–10–31.

27. Habeas Corpus ⇐85.2(1)

In habeas corpus context, petitioner bears burden of producing substantive evidence to support such a claim as that sentence is cruel and unusual because administration is based on prisoner's race, sex and economic status. 28 U.S.C.A. § 2254.

28. Habeas Corpus ⇐85.5(15)

Where petitioner had not pointed to any acts evidencing intentional discrimination on basis of sex or wealth in administration of death penalty, federal habeas court was without basis to evaluate complaint that death sentence was cruel and unusual because administration of death penalty was often based on prisoner's race, sex and economic status. 28 U.S.C.A. § 2254.

29. Habeas Corpus ⇐45.2(4)

Fact that Georgia had not adopted Model Penal Code test for insanity was not cause to overturn murder conviction on petition for habeas corpus. 28 U.S.C.A. § 2254; U.S.C.A. Const.Amend. 14; O.C.G.A. §§ 16–3–2, 16–3–3; Ga.Code, §§ 26–702, 26–703.

30. Constitutional Law ⇐268.2(2)

It was not constitutional error to rely on right/wrong test for insanity under Georgia law where defendant was unable to describe any delusion that afflicted him at time of murder and recalled nothing about death of victim. 28 U.S.C.A. § 2254; U.S.C.A. Const.Amend. 14; O.C.G.A. §§ 16–3–2, 16–3–3; Ga.Code, §§ 26–702, 26–703.

31. Homicide ⇐237

Evidence was sufficient to support determination that state had proved defendant's sanity at time of murder and at time of trial. 28 U.S.C.A. § 2254; O.C.G.A. §§ 16–3–2, 16–3–3; Ga.Code, §§ 26–702, 26–703.

32. Mental Health ⇐434

State provided defendant, who was treated by psychiatrist at state hospital for 56 days, who was then granted continuance so that he could gather further psychiatric evidence, who was subsequently examined by psychiatrist and psychologist, and who was thereafter required to undergo fourth psychological evaluation at state expense when he entered plea of insanity, with adequate psychiatric evaluation. O.C.G.A. §§ 16–3–2, 16–3–3; Ga.Code, §§ 26–702, 26–703.

33. Jury ⇐108

Potential juror can be excused from panel in homicide prosecution if he or she is irrevocably committed to vote against death penalty. Ga.Code, § 26–3102; O.C.G.A. § 17–10–31.

34. Jury ⇐108

If potential juror, who responded twice in the negative when asked whether she could impose death penalty, had been tentative or equivocal in answer, there would not have been sufficient basis to exclude her for cause, but inasmuch as responses were firmly and definitely negative, she was properly excluded on finding that she would automatically vote against death penalty. Ga. Code, § 26–3102; O.C.G.A. § 17–10–31.

35. Constitutional Law ⇐267
Jury ⇐33(2.1)

Exclusion of death-scrupled jurors from panel in homicide prosecution did not result in prosecution-prone jury in violation of defendant's Sixth and Fourteenth Amendment rights where record did not reveal that any jurors were so biased in favor of death penalty that they would

have imposed it without reasonably weighing and considering evidence and veniremen indicated that they were prepared to perform their civic obligations and would obey the law. U.S.C.A. Const.Amends. 6, 14; Ga.Code, § 26–3102; O.C.G.A. § 17–10–31.

36. Witnesses ⇐52(1)

Defendant had no standing to exclude wife's testimony at trial under interspousal privilege. U.S.C.A. Const.Amend. 4; Ga.Code, § 38–1604; O.C.G.A. § 24–9–23.

37. Witnesses ⇐52(1)

Privilege against spousal testimony is available only to witness spouse. U.S.C.A. Const.Amend. 4; Ga.Code, § 38–1604; O.C.G.A. § 24–9–23.

38. Criminal Law ⇐1153(1)
Witnesses ⇐79(1)

Trial court is afforded broad discretion in determining admissibility of witness' testimony, and its determination will not be disturbed absent clear showing of abuse. U.S.C.A. Const.Amend. 4; Ga.Code, § 38–1604; O.C.G.A. § 24–9–23.

39. Criminal Law ⇐393(3)

Defendant suffered no constitutional deprivation as result of blood test performed by serologist, who testified at trial that she matched defendant's blood type and that of victim with stains found on murder weapon, a rag, and defendant's clothing, where record indicated that police informed defendant that sample of his blood was needed as evidence, and defendant willingly agreed to go to hospital for purpose of taking blood sample and voluntarily consented to procedure. U.S.C.A. Const.Amends. 4, 14.

40. Criminal Law ⇐1169.9

Error, if any, in admission of serologist's testimony that she analyzed samples of defendant's blood and matched his blood type and that of victim with stains found on murder weapon, a rag and defendant's clothing was harmless where, having confessed to killing, defendant's only defense was insanity, and evidence of defendant's guilt was overwhelming. U.S.C.A. Const. Amends. 4, 14.

41. Criminal Law ⇐339.6

When identification is challenged on other than Sixth Amendment grounds, appropriate analysis emerges from Fifth and Fourteenth Amendments' proscription against procedures which are unnecessarily suggestive and conducive to irreparable mistaken identification. U.S.C.A. Const. Amends. 5, 6, 14.

42. Criminal Law ⇐339.11(5)

If clear and convincing evidence demonstrates independent origin for witness' identification, testimony is admissible notwithstanding impermissibly suggestive lineup. U.S.C.A. Const.Amends. 5, 6, 14.

43. Criminal Law ⇐339.10(8)

Witness' identification of defendant at trial was independent of lineup evidence and there was no likelihood of irreparable misidentification, and thus testimony was properly admitted, where witness, who had been shopping in convenience store shortly before clerk's corpse was discovered, had observed defendant there for approximately ten minutes, and defendant waited on witness, told witness that someone had robbed store, and failed to charge witness for his purchase. U.S.C.A. Const.Amends. 5, 6, 14.

44. Constitutional Law ⇐266.1(1)

Introduction of defendant's confession at trial was not constitutional error where approximately four hours elapsed from moment of defendant's first contact with police officers until his confession, testimony of police officers disclosed that defendant was advised of and voluntarily waived his rights, there was no evidence that defendant's detention was unreasonable, and, although defendant was of below-average intelligence, he admitted that he was familiar with criminal process and understood police officers' statements to him. U.S.C.A. Const.Amends. 4, 5.

45. Criminal Law ⇐412.1(1), 525

Although statements or confessions made during time of mental incompetency or insanity are involuntary and hence inadmissible, mere emotionalism and confusion do not necessarily invalidate them.

Law ⇐519(1)

ariness of confession is premised on totality of circumstances.

47. Criminal Law ⇐338(7)

Trial court has broad discretion in passing on admissibility of evidence, including testimony that may be calculated to create prejudice against or sympathy for accused.

48. Criminal Law ⇐338(7)

It is for trial court to determine whether probative value of evidence is outweighed by possible prejudicial impact.

49. Criminal Law ⇐986.6(3)

Trial court did not abuse its discretion in admitting testimony of victim's mother, who testified briefly and unemotionally as to her deceased daughter's age, employment and marital status, and her identification of victim's son at sentencing hearing where evidence was neither inflammatory nor prejudicial.

50. Habeas Corpus ⇐59

Refusal to grant new evidentiary hearing on habeas corpus petition was not error where petitioner had already had full and fair federal evidentiary hearing on claims bearing upon ineffective assistance of counsel and there were no questions of fact pertaining to any other allegations that would require further development. 28 U.S.C.A. § 2254; U.S.C.A. Const.Amends. 6, 14.

W. Davis Hewitt, Atty. Gen., Atlanta, Ga., for respondent-appellant, cross-appellee.

Harold A. Miller, III, Decatur, Ga., for petitioner-appellee, cross-appellant.

Appeal from the United States District Court for the Northern District of Georgia.

Before HILL and HENDERSON, Circuit Judges, and GARZA *, Senior Circuit Judge.

* Honorable Reynaldo G. Garza, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

HENDERSON, Circuit Judge:

The petitioner-appellee, Charles Thomas Corn, filed a writ of habeas corpus pursuant to the provisions of 28 U.S.C. § 2254 (1976) seeking to overturn his conviction and death sentence for murder and his conviction for armed robbery in the Superior Court of Clayton County, Georgia. He alleged twenty-one grounds for relief in the district court, although some of these issues were not raised in the state trial or habeas corpus court. However, by supplemental brief to this court, the state has expressly waived the exhaustion requirement. *See Lamb v. Jernigan*, 683 F.2d 1332, 1335 n. 1 (11th Cir.1982), *cert. denied*, — U.S. —, 103 S.Ct. 1276, 75 L.Ed.2d 496 (1983). Of the perceived twenty-one errors asserted in the federal district court, all but one were rejected by that court. The district court did find merit in Corn's challenge to the sentencing procedure in the state trial court, and granted his application for a writ of habeas corpus. The respondent in the state and federal habeas proceedings, Walter Zant, appeals the grant of the writ and Corn cross-appeals the denial of his other grounds of relief.

Charles Thomas Corn was convicted of murdering a "Stop and Go" convenience store employee and stealing $17.00 from the cash register in Clayton County, Georgia in 1975. The shop attendant, Mary Long, was dragged into the storage area where she was stabbed to death with a steak knife. After he killed Long, and with her blood on his hands and shirt, Corn waited on customers, telling them he had been the victim of an attempted robbery. These customers subsequently identified Corn. When Corn was arrested a few days later, his wife came to the police station and asked if he had killed the woman at the Stop and Go store. He answered, "Yes, I killed the girl, but I didn't mean to."

Upon his conviction, a superior court jury sentenced him to death on May 26, 1976.

On a mandatory review of the death sentence in accordance with Ga.Code Ann. § 27-2537 (recodified as Off.Code Ga.Ann. § 17-10-35 (1982)), the Supreme Court of Georgia upheld Corn's sentence of death for murder but suspended its imposition for the armed robbery conviction. *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694 (1977), *cert. denied*, 436 U.S. 914, 98 S.Ct. 2255, 56 L.Ed.2d 415 (1978). Corn then filed a petition for a writ of habeas corpus in the Superior Court of Tattnall County, Georgia. The state habeas court denied relief, which denial was subsequently affirmed by the Georgia Supreme Court. *Corn v. Hopper*, 244 Ga. 28, 257 S.E.2d 533 (1979). Corn then instituted this federal habeas corpus action in the United States District Court for the Northern District of Georgia. The application was referred to a magistrate under 28 U.S.C. § 636(b)(1)(B) (West Supp. 1983). The magistrate in turn reviewed the transcript of the state trial proceedings and conducted an evidentiary hearing on Corn's ineffective assistance of counsel claim. In an exhaustive report and recommendation to the district court, the magistrate recommended the denial of all the petitioner's claims except one—that the trial court's instructions on malice and intent impermissibly shifted the burden of proof to the defendant in violation of the due process clause of the fourteenth amendment to the United States Constitution. *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). Upon review, the district court adopted the bulk of the report and recommendation but disagreed with two of the magistrate's findings. The district judge first rejected the conclusion that the instructions on intent unconstitutionally shifted the burden of proof. However, as indicated, the district court granted the writ based on his belief that the state trial judge impermissibly disclosed to the jury that Corn had an automatic appeal of the death sentence to the Supreme Court of Georgia.

[1, 2] Before turning to Corn's specific allegations of error, we again emphasize that a federal court does not sit as a state appellate court to correct violations of state evidentiary rules. *Bryson v. Alabama*, 634 F.2d 862 (5th Cir.1981); *Meyer v. Estelle*, 621 F.2d 769, 771 (5th Cir.1980); *Woods v. Estelle*, 547 F.2d 269, 271 (5th Cir.), *cert. denied*, 434 U.S. 902, 98 S.Ct. 297, 54 L.Ed.2d 188 (1977).[1] Nor is it our role to analyze every infirmity that might have been reached on direct appeal. Our inquiry is restricted to those aspects of the trial affecting the petitioner's federal constitutional rights, see, *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *Passman v. Blackburn*, 652 F.2d 559, 567 (5th Cir.1981) *cert. denied*, 455 U.S. 1022, 102 S.Ct. 1722, 72 L.Ed.2d 141 (1982); *Martin v. Wainwright*, 428 F.2d 356, 357 (5th Cir.1970), *cert. denied*, 400 U.S. 918, 91 S.Ct. 179, 27 L.Ed.2d 157 (1970).

[3-5] We address first the alleged error which led the district court to grant the writ. Corn maintains that the state trial judge improperly informed the jury of Georgia's automatic appeal rule. Ga.Code Ann. § 27-2537 (recodified as Off.Code Ga. Ann. § 17-10-35 (1982)). He says, and the district court agreed, that such a remark had the effect of diminishing the jurors' sense of responsibility in making their life or death decision at this crucial stage of the trial.[2] This problem arose during a break in the jury's deliberations when some of the jurors questioned the trial judge about his

1. In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc), the Eleventh Circuit adopted as precedent the decisions of the Fifth Circuit rendered prior to October 1, 1981.

2. Corn did not object during the trial to the judge's comments. Generally, failure to object precludes subsequent consideration of an issue unless the defendant can satisfy the cause and prejudice test set forth in *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). However, as we stated in *Rogers v. McMullen*, 673 F.2d 1185, 1188 (11th Cir.1982), where a state court does not rely on a procedural default in its decision, but reaches the merits of the issue, this court may review the substantive question on appeal. *See also Thompson v. Estelle*, 642 F.2d 996 (5th Cir. 1981). The Georgia courts reached this constitutional ground, and thus, we are not foreclosed from reviewing it.

authority to change the sentence imposed by that body. The relevant portion of the colloquy between the court and the jurors is as follows:

Juror Deaton: Yes, your Honor, if the death penalty is invoked, does that automatically mean that the defendant will be placed in the electric chair?

Court: I don't know how to answer that, except I will say this. In the event there is a death penalty, the law provides for mandatory appeal and the case must be appealed by law. And if upon affirmance by the higher court, then the matter is as it is provided by law. [sic] I hesitate to say much more to you because for fear that I may make some judicial error in the case and I can only tell you that I have already told you about as much as I can under the law. Now is there anything else bearing on your mind?

Juror Randall: One thing that has been going through our minds is if we invoke the death penalty and that specifies the electric chair, can you as the overriding judge right now say, come in and say that he is going to get the electric chair or that he can have death by prison, or life imprisonment? That he is to die in prison and never to get out?

Court: Now the—

Juror Randall: Could you yourself do that?

Court: The Court by law in this particular case fix [sic, and] imposes sentence that you provide in your sentence. I cannot change your sentence.

Juror Randall: *That's what we wanted to know, if you could do that.*

Court: The only sentence that I would pass is as I told you if you find no aggravating circumstances in connection with Count 1 pertaining to armed robbery, then I would set that sentence.

Juror: Not to repeat yourself, but if we did say life imprisonment, we have no idea about parole at all, right?

Court: That's right. This is something that the Court is not authorized to comment on.

Trial Transcript at 1077–78. (Emphasis added).

The jury then retired to the jury room and shortly thereafter returned with their recommendation of the death penalty. The trial judge imposed the sentence of death as required by law. Ga.Code Ann. § 26–3102 (recodified as Off.Code Ga.Ann. § 17–10–31 (1982)).

In reviewing the denial of Corn's state habeas corpus petition, the Supreme Court of Georgia considered whether the trial judge's reference to the appellate process was so prejudicial as to necessitate granting post-conviction relief. The court affirmed the state habeas court, stating:

> Viewing the court's sentencing charge as a whole, we find that the jury was instructed to decide on their sentence from the evidence and law presented at the sentencing hearing, taking the full responsibility of determining life or death for the defendant. No remarks by the court could be construed as encouraging the jury to attach diminished consequences to their verdict.

Corn v. Hopper, 244 Ga. 28, 31, 257 S.E.2d 533, 536 (1979). We agree with the Georgia Supreme Court. The court explicitly held that this determination did not conflict with its prior decisions in which the death penalty was set aside when prosecutors, in their arguments, had referred to the mandatory review procedures. In *Prevatte v. State*, 233 Ga. 929, 214 S.E.2d 365, 367 (1975), the death sentence was vacated because the "inevitable effect" of the prosecutor's emphasis on the defendant's right to an automatic appeal was "to encourage the jury to attach diminished consequence to their verdict." Similarly, where the district attorney stressed to the jury that "the State executes only guilty persons after they've been tried and convicted and appealed and everything exhausted," Georgia's highest court did not hesitate to invalidate the death penalty. *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833, 839 (1977). *See also,*

Fleming v. State, 240 Ga. 142, 240 S.E.2d 37 (1977) (death sentence set aside due to prosecutor's improper prediction of the consequences of the jury's verdict). However, in *Coker v. State*, 234 Ga. 555, 216 S.E.2d 782 (1975), a death sentence was affirmed when the trial judge's curative instruction alleviated the harmful effect of the prosecutor's reference to mandatory review in capital cases. In the case at bar, the district court observed that because "of the unique position occupied by the trial judge" the comments of the court at Corn's trial might have been more prejudicial than similar statements made by prosecutors in other instances.

Our problem with this reasoning is not so much the propriety of the state trial judge's statement within the framework of state trial procedure as the implication that it rises to the level of constitutional error. Here, the brief mention of the right to appellate review was not the prejudicial argument of a district attorney, but the court's misinterpretation of a question posed by one of the jurors. It is obvious that the jury was not concerned with the appellate process when it made its initial inquiry of the court. Rather, its sole interest was whether the court could legally disregard its verdict and change the recommended sentence. The trial judge, perhaps understandably, failed to recognize the import of the jury's question and inadvertently mentioned the right of automatic appellate review. Only when a jury member repeated the original question did the judge correctly respond that he could not overturn the jury's recommendation.

[6, 7] It is within this narrow factual setting that we address Corn's due process claims. At the outset, we note that the death sentences in *Hawes*, *Prevatte* and *Fleming* were set aside on direct appeal rather than in habeas corpus proceedings. Consequently, the Georgia court was not required to consider the constitutional impact of the alleged error but confined itself to state law resolutions. By contrast, in a federal habeas action, Corn's entitlement to relief must be predicated on due process grounds.[3] A reference to the automatic appeal of the death penalty in a different context might have resulted in fundamental unfairness. However, on these facts, viewing the judge's remark in light of the whole sentencing procedure, we conclude that Corn did not suffer any constitutional deprivation.

[8] The jurors were obviously uncertain about the mechanics of the sentencing procedure, and the court was attempting to explain the process in which they played such a critical role. The judge did little more than reiterate parts of his earlier charge to the jury to weigh all the evidence and return a verdict on which "it would then be the duty of the Judge to sentence the Defendant . . . as provided by law." Trial Transcript at 1616. No rule requires that the jury be kept totally ignorant of the appellate process. There is no indication that mere knowledge of Corn's potential appeal diminished the jury's sense of responsibility for its sentence.

We find little federal precedent that directly bears on this issue. The decision of the United States Court of Appeals for the Second Circuit in *United States v. Greenberg*, 445 F.2d 1158 (2d Cir.1971), a review on direct appeal of a non-capital case, espouses the same reasoning that we find persuasive in the case at bar. In *Greenberg*, the court stated,

> It might have been better procedure not to have told the jury that if they convicted upon an erroneous charge they did not 'have to worry' because this court would reverse if there were error. This might have lessened the jury's sense of

3. *See Passman v. Blackburn*, 652 F.2d at 567 where, in discussing the standard for reviewing prosecutorial misconduct in habeas corpus proceedings, the court stated, "Further, not every trial error or infirmity which might on direct appeal call for application of our supervisory powers correspondingly constitutes a denial of due process necessary to support granting habeas corpus relief. *Donnelly, supra*, 416 U.S., at 642–43, 94 S.Ct., at 1871; *Cobb v. Wainwright*, 609 F.2d 754 (5th Cir.), *cert. den.*, 447 U.S. 907, 100 S.Ct. 2991, 64 L.Ed.2d 857 (1980)."

responsibility but such a reaction would be unlikely.

The contrary view was expressed by the Seventh Circuit Court of Appeals in *United States v. Fiorito*, 300 F.2d 424 (7th Cir.1962) where the court held that it was reversible error for the judge to tell the jury, "[T]hat's why we have a court of appeals, they will reverse me if I'm wrong. This is not the final judgment, there is a court of appeals to review me and a Supreme Court to review them." *Id.* at 426. Unlike this case, *Fiorito* involved the direct appeal of a federal narcotics conviction rather than a collateral attack on a state court judgment. In addition, the judge's statements in *Fiorito* were clearly aimed at lessening the significance of the jury's decision, whereas in the case at bar, the court's remarks dealt with the limited scope of the judge's own power.

Our holding today should not be broadly interpreted to apply to all such comments in other cases but, as stated earlier, is limited to the peculiar facts before us. In this particular instance, the prejudice to Corn, if any, did not reach the magnitude of a due process violation. Thus, this claimed error is no basis for habeas corpus relief.

[9] As pointed out earlier, the magistrate in his report and recommendation found that during the guilt determination phase of Corn's trial, the jury instructions on presumption of intent impermissibly and unconstitutionally shifted the burden of proof to the defense. The critical language used by the trial court is "[t]he law presumes every intentional homicide to be malicious until the contrary appears from circumstances of alleviation and justification, mitigation or excuse."[4] Corn also objects to that portion of the charge that "[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts" and that "[t]he law presumes every person to be sane unless it is shown to the contrary that he is insane or of unsound mind." Record, vol. 8 at 1534; 1536–37. He claims that this sanity charge, when taken in conjunction with the instruction on intent, could have caused the jury to believe that the defendant had the duty to negate the element of malice. Under Georgia law, malice, either express or implied, is an essential element of murder and must be established by the prosecution beyond a reasonable doubt. Ga.Code Ann. § 26–1101 (recodified as Off.Code Ga. Ann. § 16–5–1 (1982)); *Davis v. State*, 237 Ga. 279, 227 S.E.2d 249 (1976).

[10] In examining the instructions for possible constitutional infirmity, we must determine whether a reasonable jury might have failed to understand, from the entire charge, that there was a rebuttable presumption of intent or malice and that they were free to weigh all the evidence. *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). This court has recently addressed the constitutionality of purported burden-shifting jury instructions. *See Goodwin v. Balkcom*, 684 F.2d 794 (11th Cir.1982), *cert. denied*, — U.S. —, 103 S.Ct. 1798, 76 L.Ed.2d 364 (1983); *Lamb v. Jernigan*, 683 F.2d 1332 (11th Cir.1982), *cert. denied*, — U.S. —, 103 S.Ct. 1276, 75 L.Ed.2d 496 (1983); *Hearn v. James*, 677 F.2d 841 (11th Cir.1982); *Mason v. Balkcom*, 669 F.2d 222 (5th Cir. Unit B 1982), *cert. denied*, — U.S. —, 103 S.Ct. 1260, 75 L.Ed.2d 487 (1983).[5] While the analysis in these opinions is helpful, the cases are not dispositive because each set of instructions differs in length and phraseology, and none is identical to the charge given at Corn's trial.

[11] Our inquiry focuses on whether these instructions shifted the burden of proof to the petitioner on the issue of intent to kill, in violation of the due process clause of the fourteenth amendment. *Mason*, 669 F.2d at 225. Under this test, the court does

4. The complete quotation of this portion of the charge of the court is reproduced as Appendix "A" at the end of this opinion.

5. *Mason v. Balkcom* is binding on the Eleventh Circuit as a post-September 30, 1981 decision of a Unit B panel of the Former Fifth Circuit. *See Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir.1982).

not scrutinize discrete portions of the charge but must evaluate it in its entirety:

> It is well established that '[i]n determining the effect of [an] instruction on the validity of [a] conviction, . . . a single instruction may not be judged in artificial isolation, but must be viewed in the context of the overall charge.' *Cupp v. Naughten*, 414 U.S. 141, 146–47, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973). '[T]he question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.' *Id.* at 147, 94 S.Ct. at 400. *Accord Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736, 52 L.Ed.2d 203 (1977). The approach mandated by the above cases requires courts to consider the effect even of patently erroneous instructions in light of the remainder of the charge and the entire trial.

Lamb, 683 F.2d at 1339.

[12-14] In light of the overall charge of the court, we do not believe that the burden of proof was shifted to Corn to demonstrate a lack of malice. The instructions found to be unconstitutionally burden-shifting in *Sandstrom* contained no curative language to the effect that the presumption of intent could be rebutted.[6] The charge in this case, however, unequivocally stated "but this presumption may be rebutted," and "[a] person will not be presumed to act with criminal intention." Record, vol. 8 at 1535. Moreover, the instructions were clear that the accused "may" show circumstances to negate intent, "[b]ut he is not required to do so", and that he "may" show that the killing was done without malice, "[b]ut he is not required to do so." Record, vol. 8 at 1533. The charge is replete with cautious explanations that refute Corn's claim that an irrebuttable presumption weighed against him. By way of example the court stated "[i]f such evidence produced against the accused, if there be such, discloses the homicide was done without malice, then this presumption that the homicide is malicious does not exist." The instruction continued, "this presumption . . . does not arise against the slayer unless it be first shown to a moral and reasonable certainty and beyond a reasonable doubt the defendant was the intentional slayer." Record, vol. 8 at 1533. In contrast, the charge in *Lamb* contained the damaging phrase, "[t]he law presumes that every homicide is malicious until the contrary appears from circumstances . . . *and it is incumbant* [sic] *upon the accused to make out such circumstances to your satisfaction* . . ." *Lamb*, 683 F.2d at 1337 n. 8 (emphasis added). There was no comparable language in this case to suggest a shift in the burden of proof to Corn. At most, there was a permissible inference[7] that the defendant *could*, if he so chose, introduce mitigating evidence.[8] The United States Supreme Court has recognized that

6. The Supreme Court specifically noted that the jurors in *Sandstrom* "were not told that the presumption could be rebutted . . . by the defendant's simple presentation of 'some' evidence; nor even that it could be rebutted at all." 442 U.S. at 517, 99 S.Ct. at 2455, 61 L.Ed.2d at 46.

7. This conclusion is consistent with the Supreme Court of Georgia's characterization of a similar instruction. That court, at the request of the United States Supreme Court, reconsidered an analogous jury charge and held that such instructions, "taken together, created merely a permissive presumption of the type considered in *County Court of Ulster v. Allen* [442 U.S. 140, 99 S.Ct. 2213], 60 L.Ed.2d 777 (1979)," and not a mandatory and unconstitutional presumption. *Whisenhunt v. State*, 152 Ga.App. 829, 264 S.E.2d 271 (1979) *cert. denied*, 449 U.S. 886, 101 S.Ct. 241, 66 L.Ed.2d 112 (1980). *Accord Huffman v. State*, 153 Ga. App. 203, 265 S.E.2d 603 (1980); *Skrine v. State*, 244 Ga. 520, 260 S.E.2d 900 (1979).

8. As we stated in *Lamb*, "[t]he Supreme Court has recognized that inferences that operate to shift only a low burden of production—and not the burden of persuasion—to the defendant are constitutionally acceptable if there is a rational connection between the inference and the underlying facts. *See Ulster County Court v. Allen*, 442 U.S. at 157 n. 16, 99 S.Ct. at 2225 n. 16; *Mullaney v. Wilbur*, 421 U.S. [684] at 701–02 & nn. 28, 30–31, 95 S.Ct. [1881] at 1891 & nn. 28, 30, 31 [44 L.Ed.2d 508]." *Lamb*, 683 F.2d at 1338 n. 9. *See also Hammontree v. Phelps*, 605 F.2d 1371 (5th Cir.1979).

"[i]nferences and presumptions are a staple of our adversary system of factfinding." *County Court of Ulster v. Allen*, 442 U.S. 140, 156, 99 S.Ct. 2213, 2224, 60 L.Ed.2d 777, 791 (1979). The "ultimate test" in determining whether a presumption in a criminal case is valid under the due process clause of the fourteenth amendment is that "the device must not undermine the factfinder's responsibility at trial, based on the evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." *Id.* The instructions in this case were fair and balanced in both tone and content. Whatever untoward effect any part of the instruction may have had was entirely vitiated by the clear statement of the state's responsibility to prove intent beyond a reasonable doubt. The Constitution guarantees each defendant a fundamentally fair trial, not a perfect one. The charge as a whole did not impermissibly shift the burden of proof to Corn in violation of his due process rights.

Corn next urges that he was denied effective assistance of counsel in that (1) the trial court refused to provide transcripts and additional funds for his defense and (2) his trial counsel furnished ineffective representation. The magistrate conducted an evidentiary hearing, Record, vol. 10, and found that Corn was not deprived of his sixth amendment right to effective counsel, which finding was adopted by the district court.

[15, 16] Neither the court's refusal to provide transcripts nor counsel's failure to order a record of the opening and closing remarks at the trial deprived Corn of effective assistance. There is no statutory duty to transcribe those statements. Under Ga. Code Ann. § 27-2401, (recodified as Off. Code Ga.Ann. § 17-8-5 (1982)), the court reporter records the entire trial "except the argument of counsel." Corn contends, however, that the Supreme Court of Georgia could not properly assess the fairness of his death sentence without considering the opening and closing remarks. The court reviewed the record and determined that the death penalty was not imposed under the influence of "passion, prejudice or any other arbitrary factor." *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694 (1977), *cert. denied*, 436 U.S. 914, 98 S.Ct. 2255, 56 L.Ed.2d 415 (1978); Ga.Code Ann. §§ 27-2537(a)-(c)(1) (recodified as Off.Code Ga.Ann. § 17-10-35(a)-(c)(1) (1982)). The appellant insists though, that there is no greater opportunity for prejudice than in the arguments of counsel, and that the failure to preserve that part of the proceedings was error of a constitutional magnitude. He did not, however, object to any part of the opening or closing statements, nor does he point to any infirmities during those phases of the trial. Absent any showing of harm by a petitioner, it is settled that failure to transcribe counsel's arguments is not a constitutional violation requiring vacation of a death sentence. *Stephens v. Zant*, 631 F.2d 397, 402-04 (5th Cir.1980), *reh. denied and modified*, 648 F.2d 446 (1981), *certified to the Supreme Court of Georgia on other grounds*, 456 U.S. 410, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982).

[17] Corn also alleges that because of his indigency he was deprived of the opportunity for a fair hearing in that he could not afford the cost of transcribing the opening and closing remarks. However, as the magistrate correctly observed, there is no indication that the transcription would have been denied, despite Corn's lack of funds, if he had but asked for it. Since Corn did not make such a demand, there is no error in the failure to transcribe. *See Lyle v. State*, 131 Ga.App. 8, 205 S.E.2d 126 (1974); *Ellis v. State*, 137 Ga.App. 834, 224 S.E.2d 799 (1976).

[18-21] The other contentions concerning ineffective assistance of counsel are equally without merit. The appropriate inquiry is whether the petitioner was represented by counsel reasonably likely to render and in fact rendered reasonably effective assistance. *United States v. Phillips*, 664 F.2d 971, 1040 (11th Cir.1981), *cert. denied*, — U.S. —, 103 S.Ct. 208, 74 L.Ed.2d 166 (1982). *Accord, Kemp v. Leggett*, 635 F.2d 453 (5th Cir.1981); *Herring v. Estelle*, 491 F.2d 125, 127 (5th Cir.1974); *quoting MacKenna v. Ellis*, 280 F.2d 592,

599 (5th Cir.), *cert. denied*, 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1960).[9] Rather than taking isolated instances out of context, we determine whether effective service was rendered based on the totality of the circumstances. *United States v. Gibbs*, 662 F.2d 728 (11th Cir.1981). Corn complains that his attorney failed to pursue certain defenses, file additional motions, and make specific objections. However, such matters of trial strategy are, of necessity, the decisions of the attorney, and the sixth amendment right to reasonably effective counsel does not mean errorless assistance or counsel judged ineffective by hindsight. *Ford v. Strickland*, 696 F.2d 804 (11th Cir.1983) (en banc); *Washington v. Strickland*, 693 F.2d 1243 (5th Cir. Unit B 1982) (en banc), *cert. granted*, — U.S. —, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983).

[22] Corn's counsel cannot be castigated, for example, for failing to pursue a "delusional compulsion" defense instead of a "right/wrong" insanity defense when the defendant insisted that he remembered absolutely nothing about the murder. It would have been difficult, at best, for his lawyer to have shown that Corn was suffering from a certain delusion when the defendant could not even recall the chain of events.

[23] Moreover, to warrant the grant of habeas corpus, Corn would have to prove that the assistance, even if ineffective, "created not only a *possibility* of prejudice, but that '[it] worked to his *actual* and substantial disadvantage.'" *Washington v. Strickland*, 693 F.2d at 1258 *quoting United States v. Frady*, 456 U.S. 152, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816 (1982) (emphasis in original). As stated in *Adams v. Balkcom*, 688 F.2d 734 (11th Cir.1982), "'prejudice' does not embrace errors which are merely detrimental to appellant's case." *Id.* at 739, *citing Washington v. Watkins*, 655 F.2d 1346, 1360 (5th Cir.1981), *cert. denied*, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982).

[24] In summary, we find that Corn's trial counsel made strategic decisions reasonably calculated to afford effective representation, and Corn has not shown that those choices so prejudiced him as to violate any constitutionally protected right. Therefore, we agree with the district court that Corn's attorney was "capable of rendering and actually did render reasonably effective assistance, based on the totality of the circumstances." *Phillips*, 664 F.2d at 1040; *Nelson v. Estelle*, 642 F.2d 903 (5th Cir.1981).

[25] Corn also claims that his sentence was determined in an arbitrary and capricious manner and in violation of *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). In *Godfrey*, the United States Supreme Court construed one of the statutory aggravating circumstances, Ga. Code Ann. § 27-2534.1(b)(7),[10] and stated that the death penalty for murder cannot be imposed absent specific findings of torture, depravity of mind, or aggravated battery to the victim. *Id.*, 446 U.S. at 431–32, 100 S.Ct. at 1766–67, 64 L.Ed.2d at 408–09. In Corn's case, the jury was instructed that it must find statutory aggravating circumstances as a prerequisite to imposing a

9. As the district court noted, when a general due process claim is raised under the fourteenth amendment, the test for constitutionally ineffective assistance of counsel is whether the whole proceeding was "fundamentally unfair." *Nelson v. Estelle*, 642 F.2d 903, 907–08 (5th Cir.1981); *Hills v. Henderson*, 529 F.2d 397, 401 and n. 8 (5th Cir.), *cert. denied sub nom. Hills v. Maggio*, 429 U.S. 850, 97 S.Ct. 139, 50 L.Ed.2d 124 (1976).

10. Ga.Code Ann. § 27-2534.1(b)(7) (recodified as Off.Code Ga.Ann. § 17-10-30(b)(7) (1982)) states in pertinent part:

> In all cases of other offenses for which the death penalty may be authorized, the judge shall consider or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence: (7) the offense of murder, rape, armed robbery, or kidnaping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim.

death sentence.[11] The jury did find that there was aggravated battery to the victim, defined as when "[a] person . . . maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof." Ga.Code Ann. § 26–1305 (revised and recodified as Off.Code Ga.Ann. § 16–5–24 (1982)). This victim's nose and ear cartilage were severed, her face was cut, and four of the many stab wounds punctured her chest and back muscles, reaching her heart. A doctor testified that she must have died from those wounds in three to fifteen minutes, thus suffering the pain and disfigurement before dying. Corn claims that these facts cannot support a section (b)(7) charge because any one of the stab wounds could have been fatal, and thus the victim was not "in too much pain for very long." Such an argument is clearly spurious. The sordid evidence of the victim's injury and subsequent death more than justifies an instruction on this aggravating circumstance.

[26] Corn also alleges that the trial court erred in not clearly instructing the jury during the sentencing phase that even if aggravating circumstances were present, the jury could impose life imprisonment instead of death. A reading of the charge itself refutes this contention. After instructing the jury on statutory aggravating circumstances, the court stated, "[i]f you do not find that at least one of the statutory aggravating circumstances existed, *or if you so find but do not determine to impose the death penalty*, the form of your verdict shall be: We, the jury, fix punishment of the Defendant at life imprisonment as to Count Number Two Murder . . . " Record, vol. 9 at 1616 (emphasis added).[12] This ground of error apparently evolves from recent cases which hold that charges which do not explicitly instruct the jury of its option to recommend against death are unconstitutionally deficient. *Goodwin v. Balkcom*, 684 F.2d 794 (11th Cir.1982) *cert. denied*, — U.S. —, 103 S.Ct. 1798, 76 L.Ed.2d 364 (1983); *Spivey v. Zant*, 661 F.2d 464 (5th Cir. Unit B 1981), *cert. denied*, — U.S. —, 102 S.Ct. 3495, 73 L.Ed.2d 1374 (1982). *See also, Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion requiring instructions to focus jury's attention on consideration of mitigating circumstances and the alternative of recommending a life sentence even if aggravating circumstances are found). The charge in *Goodwin*, like that in *Spivey*, was insufficient because it did not "even slightly hint about the option to impose life imprisonment even though aggravating circumstances are found." *Goodwin*, 684 F.2d at 802. The instructions here, however, contain adequate guidelines to lead a reasonable juror to fully comprehend the duties and choices involved in the sentencing procedure. We agree with the district court that the sentencing instructions were not constitutionally infirm.

Petitioner next contends that the Georgia statutory provisions and practices governing appellate review of the death sentence violated his sixth and fourteenth amend-

11. Corn's death sentence was based on a finding of three statutory aggravating circumstances. Ga.Code Ann. §§ 27-2534.1(b)(2), 27-2534(b)(4), and 27-2534.1(b)(7) (recodified as Off.Code Ga.Ann. § 17-10-30(b)(2), (4), (7) (1982)). On this appeal, he challenges only the § (b)(7) charge.

12. The charge, when read as a whole, would make it unmistakably clear to the jurors that they have the option to impose a sentence of either death or life imprisonment. Other portions of the court's charge reinforces this conclusion:

> You are authorized to consider all of the facts and circumstances, if you find any, *in extenuation and mitigation* of punishment.
>
> Under the law of this State, every person found guilty of the offense of murder shall be punished by death by electrocution *or by imprisonment for life* in the State Penitentiary.
>
> If you find from the evidence that there were *no statutory aggravating circumstances* which you are authorized to consider, this would end your deliberation on the death penalty and *you should then return your verdict for life imprisonment*.

Record, vol. 9 at 1613–15 (emphasis added).

ment rights, and he refers specifically again to the lack of a copy of the opening and closing arguments. As we have stated, the failure to transcribe the statements did not prevent Corn from obtaining a fair review of his trial, nor did it constitute ineffective assistance of counsel. Furthermore, Corn's broadside attack on Georgia's death penalty statute is patently without merit, for the United States Supreme Court has already declared the statute to be constitutional. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

In a related argument, Corn claims that the imposition and execution of his death sentence violates the eighth and fourteenth amendments for four reasons: (1.) the death penalty is administered arbitrarily and capriciously; (2.) there is no justification for capital punishment; (3.) the death penalty violates contemporary standards; and (4.) the method of inflicting death is wanton and unnecessarily cruel. As the magistrate and district court correctly stated, these identical issues were decided adversely to the petitioner in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). *See also, Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977).

[27, 28] Corn also asserts that his sentence is cruel and unusual because administration of the death penalty is often based on a prisoner's race, sex and economic status. In a habeas corpus context, a petitioner bears the burden of producing substantive evidence to support such a claim. *See generally, Smith v. Balkcom*, 660 F.2d 573 (1981), *modified* 671 F.2d 858, 859–60 (5th Cir. Unit B 1982), *stay granted pending application to the Supreme Court*, 677 F.2d 20 (5th Cir. Unit B), *cert. denied*, —— U.S. ——, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982). Because Corn has not pointed to any acts evidencing intentional discrimination on the basis of sex or wealth, we are without a basis to evaluate his complaint. *Id.*, 660 F.2d at 585; *Spinkellink v. Wainwright*, 578 F.2d 582, 614 n. 40 (5th Cir.1978) *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979). As was stated in *Spinkellink*, "a state, if it chooses, can punish murderers and seek to protect its citizenry by imposing the death penalty—so long as it does so through a statute with appropriate standards to guide discretion." *Id.*, 578 F.2d at 605. We reiterate that the constitutionality of the Georgia statute was upheld by the United States Supreme Court in *Gregg*. The sentencing guidelines are therefore adequate. Without substantiating evidence, the petitioner's bare allegation of discrimination must fail.

Corn further alleges that the state did not introduce sufficient evidence to rebut his showing that he was legally insane at the time of the murder. Additionally, he argues that the test for insanity, as applied to him, violated the equal protection and due process clauses of the fourteenth amendment. He reasons that even though the evidence of his insanity was sufficient to satisfy the test as codified in Georgia, it would not have supported a finding of sanity under the Model Penal Code test, and thus, it was deficient.

[29] This argument amounts to little more than Corn's mere speculation that he might not have been convicted in some other jurisdiction where the insanity test differs from that in Georgia. Each state has a substantial interest in formulating and enforcing its own laws, and the fact that Georgia has not adopted the Model Penal Code is no cause to overturn Corn's conviction.

[30] The Georgia code provides two tests for insanity in criminal cases, the *M'Naghten* test [13] and the delusional com-

13. Ga.Code Ann. § 26-702 (revised and recodified as Off.Code Ga.Ann. § 16-3-2 (1982)) provides:

> A person shall not be found guilty of a crime if, at the time of the act, omission, or negligence constituting the crime, the person did not have mental capacity to distinguish between right and wrong in relation to such act, omission, or negligence.

This section codifies the rule expressed in *M'Naghten's Case*, 8 Eng.Rep. 718 (1843). The Supreme Court of Georgia specifically declined to abandon the *M'Naghten* Rule in *Moody v. State*, 244 Ga. 247, 260 S.E.2d 11 (1979), stating

pulsion defense.[14] Corn's attorney relied solely on the right/wrong, or *M'Naghten*, defense. He made that strategy decision because Corn was unable to describe any delusion that afflicted him at the time of the murder. Indeed, Corn said he recalled nothing at all about the death of Mary Long. Thus, because no evidence was offered to satisfy the delusional compulsion test, the court properly addressed only the *M'Naghten* Rule. It was not constitutional error to rely on this particular insanity defense under Georgia law.

[31] Having determined that the court applied the correct test, we turn next to Corn's challenge of the sufficiency of the state's evidence of his sanity. Both Corn's wife and mother-in-law testified that he knew right from wrong. Dr. William P. Sapp, who was a defense witness, stated that Corn suffered from seizures and dysfunction of the brain. (Record, vol. 8 at 1408), but Dr. Miguel Bosch, a witness for the state, testified that he did not detect any autism or signs of psychosis. (Record, vol. 8 at 1453–58). Bosch also concluded that it was difficult, if not impossible, for anyone to determine whether Corn had been sane at the time of the murder because he was not questioned until several days later. It was the jury's task to weigh and determine the relative merits of the testimony and to judge the witnesses' credibility. The jury found the testimony of Mrs. Corn and Dr. Bosch to be more credible. *See United States v. Poolaw*, 588 F.2d 103 (5th Cir.), *cert. denied*, 440 U.S. 966, 99 S.Ct. 1517, 59 L.Ed.2d 782 (1979). There is sufficient evidence to sustain the jury's verdict that the state proved beyond a reasonable doubt that Charles Corn was sane at the time of the murder and at the trial. *See Hance v. Zant*, 696 F.2d 940, 948–49 (11th Cir.1983).

[32] With respect to the issue of his sanity, Corn also claims that he was denied his constitutional rights when the court refused to grant his motion for an independent psychiatric examination. The history of Corn's psychiatric examination is extensively discussed in the magistrate's report. Record, vol. 2 at 355. After his arrest, Corn's counsel requested that Corn be evaluated at Central State Hospital. Corn was treated there by Dr. Bosch, a psychiatrist, for fifty-six days. He was then granted a continuance of his trial so that he could gather further psychiatric evidence. He was examined by Dr. Sapp, a psychiatrist, and Dr. Butcher, a psychologist. After Corn entered a special plea of insanity, the trial court required a fourth psychological evaluation at state expense. Following a special hearing on his sanity, Corn was found sane. The state has fulfilled any duty that it might have had to provide him with an adequate psychiatric evaluation.

[33, 34] Additionally, Corn raises several issues involving the selection of the jury. Specifically, he claims that his sentence is unconstitutional because the exclusion of jurors opposed to the death penalty denied him the right to be tried by a fair and impartial jury. He also asserts that the failure to disqualify jurors who might have been predisposed in favor of capital punishment violated his due process and equal protection rights. A potential juror can be excused if he or she is irrevocably committed to vote against the death penalty. *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). During voir dire, venireman Vicky White was asked: "[R]egardless of what the evidence is and regardless of what the law is, on that point, you don't think you could impose the death penalty?" She replied, "no." When

that it was "for the legislature to say whether the *McNaughton* [sic] Rule should be replaced by the A.L.I. test of mental incompetence in the trial of criminal cases." *Id.* 260 S.E.2d at 15. The legislature has not repealed the old rule.

14. Ga.Code Ann. § 26–703 (revised and recodified as Off.Code Ga.Ann. § 16–3–3 (1982)) provides:

> A person shall not be found guilty of a crime when, at the time of the act, omission, or negligence constituting the crime, the person, because of mental disease, injury, or congenital deficiency, acted as he did because of a delusional compulsion as to such act which overmastered his will to resist committing the crime.

further pressed, "Under any circumstances" she answered "no." If her answer had been tentative or equivocal, there would not have been a sufficient basis to exclude her for cause. *Maxwell v. Bishop*, 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221 (1970). White's responses, however, were firmly and definitely negative. Taken as a whole, her answers support the trial court's finding that she would automatically vote against the death penalty, and thus, it was proper to exclude her under *Witherspoon*.

Corn maintains that the exclusion of jurors who oppose the death penalty denied him the right to a jury selected from a representative cross-section of the community. In *Spinkellink*, 578 F.2d at 597–98, this court addressed questions pertaining to death-scrupled jurors, and held that when veniremen are properly struck under *Witherspoon*, their exclusion does not violate the representative cross-section requirement of the sixth and fourteenth amendments.

[35] As a corollary to the above argument, Corn contends that the exclusion of death-scrupled jurors results in a "prosecution-prone" jury. Therefore, he reasons, his conviction violated his sixth and fourteenth amendment rights in that the jury was unrepresentative and biased on the issue of guilt. This court recently rejected a similar argument in *Smith v. Balkcom*, 660 F.2d at 576–78. *Accord, Spinkellink*, 578 F.2d at 594–95. Other courts have also refused to accept the notion that the remaining jurors, after the exclusion of veniremen opposed to capital punishment, are possessed of a prosecutorial bent and are not impartial. *See Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968); *United States ex rel. Clark v. Fike*, 538 F.2d 750 (7th Cir.1976) *cert. denied*, 429 U.S. 1064, 97 S.Ct. 791, 50 L.Ed.2d 781 (1977); *United States v. Marshall*, 471 F.2d 1051 (D.C.Cir. 1972); *Douthit v. State*, 239 Ga. 81, 235 S.E.2d 493 (1977). As we said in *Smith v. Balkcom*, 660 F.2d at 578, "[a]ll veniremen are potentially biased. The process of voir dire is designed to cull from the venire persons who demonstrate that they cannot be fair to *either* side of the case." (original emphasis). The record does not reveal that any jurors in Corn's case were so biased in favor of the death penalty that they would have imposed it without reasonably weighing and considering the evidence. We concur with the district court's conclusion that the veniremen indicated that they were prepared to perform their civic obligations and that they would obey the law. Such an attitude cannot be labeled as a "hanging jury" mentality. *See Spinkellink*, 578 F.2d at 594–95.

Corn contends next that the police fraudulently induced his wife to waive her interspousal privilege and her fourth amendment right to be free from unreasonable search and seizure. Thus, he alleges, the trial court erred in admitting any evidence furnished by her. Corn's wife aided police in a search which yielded a knife and some bloody clothing. She also testified at the trial. Nothing in the record suggests that police coerced her assistance. Her cooperation was apparently voluntary.

[36–38] Corn had no standing to exclude his wife's testimony at the trial because the privilege against spousal testimony is available only to the witness-spouse. Ga.Code Ann. § 38–1604 (recodified as Off.Code Ga. Ann. § 24–9–23 (1982)); *Trammel v. United States*, 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980). Corn's wife could neither be compelled to testify nor foreclosed from doing so, and since she voluntarily took the stand, Corn cannot successfully attack the admissibility of this evidence. The trial court is afforded broad discretion in this area and its determination will not be disturbed absent a clear showing of abuse. *United States v. Dothard*, 666 F.2d 498 (11th Cir.1982). There was no such abuse of discretion in this case.

[39] A serologist testified at the trial that she analyzed a sample of Corn's blood and matched his blood type and that of the victim with stains found on the murder weapon, a rag and Corn's clothing. Corn argues that his fourth and fourteenth amendment rights were violated because his blood was seized in a warrantless search without his voluntary consent. He failed to

object initially to the admission of the serologist's testimony and would ordinarily be precluded from raising this objection on review. *See* note 2, *infra*. Nonetheless, the state habeas corpus court and the federal district court considered the merits of the alleged error and rejected it. *Corn v. Hopper*, 244 Ga. 28, 257 S.E.2d 533 (1979); District Court's Order, Record, vol. 2 at 424–25, adopting the Magistrate's report and recommendation. Corn suffered no constitutional deprivation as a result of the blood test. The record indicates that the police informed Corn that a sample of his blood was needed as evidence. Corn willingly agreed to go to the hospital for the purpose of taking the blood specimen, and although he balked momentarily at the prospect of being injected with a needle, he voluntarily consented to the procedure.[15]

[40] Moreover, as the magistrate concluded, the admission of this evidence, even if erroneous, was clearly harmless because it had no impact on Corn's defense. Having confessed to the killing, his only defense was insanity. The evidence of Corn's guilt was overwhelming, and he did not suffer any harm of constitutional proportion because of the serologist's testimony.

[41] The introduction into evidence of an improperly obtained eyewitness identification is another of Corn's claims of constitutional error. At the trial, witness Billy Sweatman identified Corn after having previously recognized him at the police station at a time when Corn was without counsel. The record is not clear that Corn had actually been arrested prior to the identification,[16] and thus, the proceedings were not necessarily at a critical stage when Corn would have a right to counsel. *Estelle v. Smith*, 451 U.S. 454, 469, 101 S.Ct. 1866, 1876, 68 L.Ed.2d 359, 373 (1981); *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972); *Moore v. Illinois*, 434 U.S. 220, 228, 98 S.Ct. 458, 464, 54 L.Ed.2d 424, 433 (1977). Indeed, in his reply brief to this court, Corn does not claim that the identification was inadmissible because his sixth amendment right to counsel was violated.[17] He simply urges that the lineup was impermissibly suggestive. When an identification is challenged on other than sixth amendment grounds, the appropriate analysis emerges from the "fifth and fourteenth amendments' proscription against procedures which are unnecessarily suggestive and conducive to irreparable mistaken identification." *Passman*, 652 F.2d at 566, *citing Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

[42, 43] If clear and convincing evidence demonstrates an independent origin for the witness's identification, the testimony is admissible. *United States v. Wade*, 388 U.S. at 241, 87 S.Ct. at 1926, 18 L.Ed.2d at 1149. Quoting *Wade*, the Court in *Moore v. Illinois*, 434 U.S. at 226 n. 2, 98 S.Ct. at 463 n. 2, 54 L.Ed.2d at 432 n. 2 stated:

15. Record, vol. 6 at 630.

16. It appears that the "lineup" identification of Corn occurred close to the moment of arrest, when Sweatman saw Corn walking in the station with a group of four or five men, two or three of whom were policemen. Corn was arrested at the Clayton County police station approximately four hours after his initial detention, roughly the same time that Sweatman was in the station. For police testimony as to the timing of the arrest, *see* Record, Vol. 6 at 997–999; 1009. For Sweatman's testimony, *see* Record Vol. 5 at 560–71.

17. It was the magistrate who stated in his report and recommendation that the initial identification procedure was impermissibly suggestive due to the absence of counsel. Corn's right to counsel had attached, according to the magistrate, because the police had already narrowed the focus of their investigation to Corn. The report cites *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *see also, Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967) (companion case). *Wade* clearly involved a critical stage, a post-indictment lineup, but that reasoning would not necessarily affect Corn's case. The definition of a critical stage was clarified in *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972) where the plurality opinion made clear that the right to counsel as announced in *Wade* and *Gilbert* attaches only to corporeal identifications conducted "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Moore v. Illinois*, 434 U.S. at 226, 98 S.Ct. at 463, 54 L.Ed.2d at 432.

Among the factors to be considered in making this determination are "the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. Billy Sweatman's identification of Corn at the trial was independent of the lineup evidence. Shortly before Mary Long's corpse was discovered, Sweatman had been shopping in the convenience store and had observed Corn there for approximately ten minutes. Corn waited on Sweatman, told the youth that someone had robbed the store, and failed to charge Sweatman for his purchase. Doubtless this experience made a sufficient impression on Sweatman for him to recognize Corn just one week later. Furthermore, Corn was independently identified in court by five other witnesses who gave the same general description of him and placed him at the scene of the killing. No objection was made to the identification at the trial.

This circuit has stated that the key factor in assessing the admissibility of identification testimony is the reliability of the identification in light of all the circumstances. *Nettles v. Wainwright*, 677 F.2d 410 (11th Cir.1982). Considering the totality of the evidence in this case, it is clear that there was no likelihood or irreparable misidentification, and the eyewitness identification testimony was properly admitted.

[44] The petitioner also attacks the introduction of his confession at the trial as unconstitutional because his detention was unreasonable and his incriminating statements were not knowingly and voluntarily made. Approximately four hours elapsed from the moment of Corn's first contact with police officers until his confession. Corn claims that he does not clearly remember waiving his rights, but the testimony of police officers discloses that prior to any questioning, Corn was advised of his rights, which he voluntarily waived in writing. Record, vol. 7 at 1277–78, 1295–96; vol. 8 at 1492; see *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). This case is not one where the defendant's will was worn down over a long period of time, nor was Corn physically abused. There is no evidence that his detention was unreasonable, and there was no violation of his fourth amendment rights. *United States v. White*, 493 F.2d 3 (5th Cir.), *cert. denied* 419 U.S. 901, 95 S.Ct. 186, 42 L.Ed.2d 147 (1974).

[45, 46] Even though Corn's statements to the police comported with the standards of *Miranda*, the question remains whether Corn's low IQ and history of emotional problems had such an impact on his confession as to render it involuntary. While it is true that statements or confessions made during a time of mental incompetency or insanity are involuntary and hence inadmissible, mere emotionalism and confusion do not necessarily invalidate them. *Sullivan v. Alabama*, 666 F.2d 478 (11th Cir.1982). The record indicates that Corn remained calm and responsive throughout the interrogation, but was a bit shaken while his wife was present. Record, vol. 7 at 1319–20. He did not appear to be confused or incompetent so as to call into question the voluntariness of his confession. Although Corn was of below-average intelligence, he admitted that he was familiar with the criminal process and he understood the policemen's statements to him. His mental capacity was also evaluated at a hearing held pursuant to the rule in *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), and the court determined that he understood his rights. Record, vol. 7 at 1310; see *United States v. Bush*, 466 F.2d 236 (5th Cir.1972). The voluntariness of a confession is premised on the totality of the circumstances, *Sullivan*, 666 F.2d at 482–83, and based on that standard, we agree that Corn's inculpatory statement was voluntary and properly admissible into evidence.

[47–49] Although he did not object at the trial, Corn later challenged the admission into evidence of the testimony of the

victim's mother and the identification of the victim's son at the sentencing hearing. He claims that such evidence was not probative of circumstances in extenuation, mitigation, or aggravation of the crime, but only served to inflame the jury. The trial court has broad discretion in passing on the admissibility of evidence, including testimony that may be calculated to create prejudice against or sympathy for the accused. It is for the trial court to determine whether the probtive value of the evidence is outweighed by possible prejudicial impact. In evaluating this charge of error, the state habeas corpus court found, and we agree, that the evidence was neither inflammatory nor prejudicial. The mother testified briefly and unemotionally as to her deceased daughter's age, employment and marital status. She also identified the child, who was a spectator in the courtroom. *United States v. Sonntag*, 684 F.2d 781 (11th Cir. 1982). The trial court did not abuse its discretion by admitting this evidence.

[50] Corn also contends that the district court erred by not granting a new evidentiary hearing. The petitioner has already had a full and fair federal evidentiary hearing on all the claims in his habeas corpus petition that bear on ineffective assistance of counsel. There are no questions of fact pertaining to any of his other allegations that would require further development. Consequently, we see no reason for an additional evidentiary hearing.

For the foregoing reasons, we AFFIRM in part and REVERSE in part and REMAND to the district court with direction to vacate the stay of execution.

APPENDIX

The complete instructions on intent given at Corn's trial are set forth below.

Now as I have stated, the other offense charged against the Defendant in Count Number Two of this bill of indictment is that of murder. And in that connection I charge you that a person commits murder when he unlawfully and with malice aforethought either express or implied causes the death of another human being. Express malice is that deliberate intention, unlawfully, to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all of the circumstances of the killing show an abandoned and malignant heart. Malice is an essential element in murder and it must exist before any homicide can be murder. Malice, in its legal sense, is not necessarily ill will or hatred; it is the unlawful, deliberate intention to kill a human being without justification or mitigation or excuse, which intention must exist at the time of the killing. It is not necessary, however, that this unlawful, deliberate intention should exist for any particular length of time before the killing. If it enters the mind of a slayer the moment before he inflicts the fatal wound, that is sufficient.

The law presumes every intentional homicide to be malicious until the contrary appears from circumstances of alleviation and justification, mitigation or excuse. The accused *may* show such circumstances to the Jury unless such circumstances appear from the evidence produced against the accused. *But he is not required to do so.* If such evidence produced against the accused, if there be such, discloses the homicide was done without malice, then this presumption that the homicide is malicious does not exist. If, however, the evidence produced against the accused, if there be such, does not disclose that the killing was done without malice, the accused *may* show that it was done without malice. *But he is not required to do so.*

I charge you, however, that this presumption which arises against the slayer where an intentional homicide is shown *does not arise* against the slayer *unless* it be first shown to a moral and reasonable certainty and beyond a reasonable doubt that the Defendant was the intentional slayer. When and if a killing is proved to your satisfaction to be the intentional act of the Defendant himself, the presumption of innocence with which he enters upon the trial is removed from him. But as I charged you

APPENDIX—Continued

heretofore, the evidence of justification or mitigation may be found in the evidence produced against him. If there be no evidence introduced against him to show justification or mitigation and if the evidence introduced shows the homicide to have been committed as charged in the indictment, the Defendant *may, but is not required to,* show mitigation or excuse.

I further charge you that it is for you, the Jury, to say whether the evidence in this case, the testimony and all of the facts and circumstances, sufficiently identify this Defendant as the slayer beyond a reasonable doubt. It is not necessary that the Defendant prove that another person committed the offense.

I charge you that the acts of a person of sound mind and discretion are presumed to be the product of a person's will, *but this presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts.* If such person uses a weapon in a manner in which such weapon is ordinarily employed to produce death and thereby causes the death of a human being, the law presumes the intent to kill. *However, this presumption may be rebutted. A person will not be presumed to act with criminal intention,* but the trier of the facts, and that is you, the Jury, in this case, *may find such intention* upon consideration of the words, conduct, demeanor and motive, if any, and all facts and circumstances connected with the act for which the accused is prosecuted.

Now, Ladies and Gentlemen of the Jury, I charge you that if you believe beyond a reasonable doubt that the Defendant did, in the County of Clayton, and State of Georgia, with a weapon described in the indictment with malice aforethought either express or implied did unlawfully and intentionally stab, cut and kill the deceased as charged in the indictment and you believe the weapon as used in the manner used was likely to produce death, then you would be authorized to convict the Defendant of the offense of murder. If you have a reasonable doubt as to the Defendant's guilt as to the defense of murder, it would be your duty to acquit the Defendant of the offense of murder.

Now, as I have stated, the Defendant, Charles Thomas Corn, contends that he is not guilty of the offense as charged in this bill of indictment. He further contends that at the time of the commission of the alleged armed robbery and murder he was a person of unsound mind, that he was insane or mentally incompetent to commit the crime charged in this bill of indictment.

Our law declares that a person shall not be convicted of any crime committed while insane. Now in that connection I charge you that a person shall be considered of sound mind who is neither a lunatic nor afflicted with mental disease and who has arrived at the age of thirteen years. A lunatic person, insane or with mental disease without lucid intervals shall not be found guilty of any crime or misdemeanor with which he may be charged, provided the act so charged as criminal was committed in the condition of such lunacy or insanity. But if a lunatic has lucid intervals of understanding, he shall answer for what he does in those intervals as if he had no deficiency.

I charge you that in order to constitute a crime, a person must have intelligence and capacity enough to have criminal intent and purpose to commit the crime charged. *The law presumes every person to be sane unless it is shown to the contrary that he is insane or of unsound mind.* On the question of sanity and insanity, the general rule in this state is that if a person has reason sufficient to distinguish between right and wrong in relation to the particular act about to be committed, he is criminally responsible. On the other hand, if he should not have reason sufficient to distinguish between right and wrong in relation to the particular act about to be committed, he would be insane in legal contemplation and not criminally responsible for such act.

I charge you that intention is an essential element of any crime and that the burden is on the State to prove such intention beyond a reasonable doubt. While *the burden is not on the Defendant to disprove intention,*

APPENDIX—Continued

nonetheless, if he introduces some competent evidence of insanity, which might tend to negate evil intention in the Defendant at the time of the commission of the alleged crime, then the burden falls upon the State to prove beyond a reasonable doubt that the Defendant was sane at the time of the alleged crime, and therefore had the requisite criminal intent. *Under Georgia law, every person is presumed to be of sound mind and discretion, but this presumption may be rebutted.* This presumption of sanity may be relied upon by the State and in most cases the State need not bear the burden of introducing evidence as to the sanity of the accused in criminal proceedings. But once the affirmative defense of insanity is raised by the Defendant, once the accused has come forward with some competent evidence of insanity whereby the mental capacity of the accused is placed in issue, then the State in order to prove criminal intent of the accused must present evidence to prove the sanity of the accused beyond a reasonable doubt.

I charge you that the question of whether or not the Defendant has successfully rebutted the presumption of sanity in this case is for you to decide. It is not necessary that the Defendant introduce evidence of his insanity sufficient to convince you beyond a reasonable doubt, but rather it is only necessary for him to introduce some competent evidence of his insanity. And when he has done this, the burden shifts to the State to prove his sanity beyond a reasonable doubt. Under Georgia law, *a person will not be presumed to act with criminal intent* but the triers of the facts, the Jurors, may find such intention or the absence thereof upon consideration of the words, conduct, demeanor, motive, evidence of sanity or insanity and all other circumstances connected with the acts for which the accused is prosecuted.

(Emphasis added.)

R.T. VANDERBILT COMPANY, Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION and Raymond J. Donovan, Respondents.

No. 82-5604.

United States Court of Appeals, Eleventh Circuit.

June 16, 1983.

Mineral product supplier appealed from decision of the Occupational Safety and Health Review Commission upholding administrative law judge's vacation of citations issued against supplier's customer relating to failure to comply with asbestos standards in workplace as result of agency's determination that mineral product contained asbestos. Supplier did not seek reversal, but rather challenged Commissioner's finding that mineral contained asbestos and argued that asbestos standard was unenforceable because of vagueness and procedural irregularities. The Court of Appeals, Johnson, Circuit Judge, held that: (1) gratuitous finding by Commission that asbestos fibers were present in mineral product used by company found to have lacked actual or constructive knowledge of presence of asbestos in workplace caused supplier actual, redressable injury by unnecessarily impugning integrity of product, thus satisfying Article III's requirement of personal stake in outcome of appeal insofar as supplier's request that Commission's finding that product contained asbestos be vacated; (2) court had no power to pass on merits of finding because appellate review of findings immaterial to case would amount to an advisory opinion; and (3) mineral supplier was not arguably within zone of interests of Occupational Safety and Health Act so it lacked a right of action.

Appeal dismissed.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED

AUG 11 1983
Sept 10
Spencer D. Mercer
Clerk OCT. 10
NOV-9

No. 81-7649

CHARLES THOMAS CORN,

Petitioner-Appellee,
(Cross) Appellant,

versus

WALTER ZANT, Warden,
Jackson Diagnostic and
Classification Center,

Respondent-Appellant.
(Cross) Appellee.

- - - - - - - - - - - - -

Appeal from the United States District Court for the Northern District of Georgia

- - - - - - - - - - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 15, 11 Cir., 1983, ____F.2d____).

(August 11, 1983)

Before HILL and HENDERSON, Circuit Judges, and GARZA*, Senior Circuit Jud

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

*The Honorable Reynaldo G. Garza, U.S. Circuit Judge

REHC-6

APPENDIX B

Ca. Code Ann. §26-1101(a)

[OCGA §16-5-1(a)]

16-5-1. Murder; felony murder.

(a) A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.

Ga. Code Ann. §27-2534

[OCGA §17-10-30]

17-10-30. Procedure for imposition of death penalty generally.

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony;

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;

(3) The offender, by his act of murder, armed robbery, or kidnapping, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or another thing of monetary value;

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor, or former district attorney or solicitor was committed during or because of the exercise of his official duties;

(6) The offender caused or directed another to commit murder as an agent or employee of another person;

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated batter to the victim;

(8) The offense of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties;

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in subsection (b) of this Code section is so found, the death penalty shall not be imposed. (Code 1933, §27-2534.1, enacted by Ga. L. 1973, p. 159, §3.)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-5716

RECEIVED
NOV 7 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CHARLES THOMAS CORN,

Petitioner,

v.

WALTER ZANT, Warden,
Georgia Diagnostic Center,

Respondent

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Petitioner, Charles Thomas Corn, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner's affidavit of indigency is attached to this motion.

Respectfully submitted,

RONALD J. ALLEN
University of Iowa
College of Law
Iowa City, Iowa 52242
(319) 353-3502

HAROLD A. MILLER, III
116 East Howard Avenue
Decatur, Georgia 30030
(404) 373-5515

COUNSEL FOR PETITIONER

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-5716

CHARLES THOMAS CORN,

Petitioner,

v.

WALTER D. ZANT, Warden,

Georgia Diagnostic Center,

Respondent

AFFIDAVIT OF INDIGENCY

I, CHARLES THOMAS CORN, being first duly sworn, depose and say that I am the Petitioner in the above-entitled cause; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes ___ No X

a. If the answer is "yes", state the amount of your salary or wages per month, and give the name and address of your employer.

_____

_____

b. If the answer is "no", state the date of last employment and the amount of the salary and wages per month which you received.

1975 $500 per month

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or form of self-employment? Yes ___ No X
b. Rent payments, interest or dividends? Yes ___ No X
c. Pensions, annuities or life insurance payments? Yes ___ No X
d. Gifts or inheritances? Yes ___ No X
e. Any other sources? Yes X No ___

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months. Gifts totaling $50 from family & friends.

3. Do you own cash, or do you have money in a checking or savings account? Yes X No ___ (Include any funds in prison accounts.)

If the answer is "yes", state the total value of the items owned. $2.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ___ No X

If the answer is "yes", describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. None

I declare under penalty of perjury that the foregoing is true and correct.

Dated: 11-23

Charles Thomas Corn
CHARLES THOMAS CORN

Sworn to and subscribed to before me
this 2nd day of November, 1983.

Vicki L Costa
NOTARY PUBLIC

My commission expires:

Mar. 31 1985

CERTIFICATE OF SERVICE

I hereby certify that I have served counsel for the opposing party with a copy of the foregoing pleading by placing same in the United States Mail with adequate first-class postage attached thereon addressed to Mr. Michael J. Bowers, Attorney General, State of Georgia, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgia 30334.

This 4th day of November, 1983.

Ronald J. Allen
COUNSEL FOR PETITIONER

University of Iowa
College of Law
Iowa City, Iowa 52242
(319) 353-3502

NO. 83-5716

Supreme Court, U.S.
FILED
DEC 9 1983
ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

CHARLES THOMAS CORN,

Petitioner,

v.

WALTER ZANT, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

MARY BETH WESTMORELAND
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Attorney General

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Attorney General

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Senior Assistant
Attorney General

Please serve:

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132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349

QUESTIONS PRESENTED

1.

Did the decision by the Court below comply with the holding of this Court in Sandstrom v. Montana, 442 U.S. 510 (1979)?

2.

Did Petitioner receive effective assistance of counsel at the sentencing phase of his trial?

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NO. 83-5716

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

CHARLES THOMAS CORN,

Petitioner,

v.

WALTER ZANT, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Charles Thomas Corn, was charged and convicted of malice murder and armed robbery in the Superior Court of Clayton County, Georgia on May 26, 1976. Petitioner was sentenced to death on each count by the same jury. On direct appeal to the Supreme Court of Georgia, that Court reversed the death sentence imposed for armed robbery, but affirmed both convictions and the death sentence for murder. This Court subsequently denied a petition for a writ of certiorari. Corn v. State, 240 Ga. 130, 240 S.E.2d 694 (1977), cert. denied, 436 U.S. 914 (1978). Petitioner filed a petition for habeas corpus relief in the Superior Court of Tattnall County, Georgia. Habeas corpus relief was denied by that Court and the Supreme Court of Georgia affirmed that denial. Corn v. Hopper, 244 Ga. 28, 257 S.E.2d 533 (1979).

A petition for habeas corpus relief was then filed pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of Georgia, Atlanta Division. An evidentiary hearing was held before the magistrate on June 17, 1980. A report and recommendation was entered on December 3, 1980 in which the magistrate recommended that habeas corpus relief be granted as to the issue of the jury instructions. Objections were filed by both parties. On June 30, 1981, the district court issued an order in which it declined to follow the magistrate's report and recommendation as to the jury instructions; however, the district court granted habeas corpus relief based on a comment by the trial court on appellate review during the sentencing phase of the trial.

Both the Petitioner and the Respondent filed notices of appeal from the decision entered by the district court. The panel of the Eleventh Circuit reversed the district court's opinion insofar as it granted habeas corpus relief and affirmed the remainder of the district court's decision, thereby denying habeas corpus relief on all counts. Corn v. Zant, 708 F.2d 549 (11th Cir. 1983). Petitioner filed a suggestion for rehearing en banc which was denied by that Court on August 11, 1983.

PART TWO

STATEMENT OF FACTS

Petitioner was indicted in Clayton County during the August Term, 1975 for armed robbery and murder. Prior to trial a special plea of insanity was heard before a jury with the jury find that Petitioner was competent to stand trial. The case then proceeded to a jury trial on the issue of guilt or innocence.

Two female friends of the victim, Mary Long, came by a Stop-and-Go Store where the victim worked, about 5:30 p.m. on August 15, 1975. Both witnesses identified the Petitioner as the young man they saw in the store at that time. The Petitioner spoke with the two girls and also asked Ms. Long if her boss was there. When the girls left about 6:00 p.m., Petitioner was still in the store.

A short while later several customers stopped by the store. These customers identified the Petitioner as the man who waited on them at the store. All of these customers noticed that Petitioner had blood on his hands and arms. They also testified that the Petitioner was wiping up blood and tinkering with the cash register. There was blood on the cash register and the counter and Petitioner had a rag wrapped around his right hand.

Petitioner told one of the customers, Billy Sweatman, that he had been robbed. Another customer, Rosemary Strickland, testified that Petitioner told her a drunk person with a knife had tried to rob him and that he been cut in the struggle. When Ms. Strickland offered to call someone to help, Petitioner told her he had already called the police. Ms. Strickland noticed that the cash drawer of the register was opened.

Mark Crabb, a frequent customer at the store, stopped there on August 15th and saw Ms. Long. Crabb also saw a man in jeans and a t-shirt whom he later identified as the Petitioner.

Petitioner had also been identified by the witnesses as wearing blue jeans and a t-shirt. Crabb left the store, but had to return a few minutes later to buy some soft drinks. When he entered the store, he did not see anyone and thought Ms. Long was in the back of the store. He then noticed blood on the counter and drops of blood leading to a back room. Crabb opened the store and found Ms. Long on the floor. He felt for her pulse but could not find one. Ms. Crabb then called the police.

The autopsy of the victim revealed multiple stab wounds, abrasions and lacerations. There were four major stab wounds, two in front and two in back, the fatal one being through the chest. It was also ascertained that about $47.00 was missing from the register of the store.

On August 17th, Petitioner came to the Riverdale police station to pay a traffic ticket. It was noticed that the Petitioner fit the description of the suspect in the murder; therefore, he was advised of his rights and questioned about the injury on his hand. He said he had cut his hand on a lawnmower.

Captain Quinlan of the Clayton County Police Department was called in and he advised Petitioner of his rights a second time. Petitioner signed a waiver and made a statement in which he claimed that he spent Friday afternoon of August 15th riding around with his wife and child, going to a hamburger place and then returning home late that night. Captain Quinlan investigated the Petitioner's story and found that it did not check out. He then informed the Petitioner of this fact and asked the Petitioner to accompany him to the Clayton County Police Department. Petitioner willingly went with Captain Quinlan.

At trial a Jackson v. Denno hearing was held during which Captain Quinlan testified that Petitioner made different

statements. Petitioner first claimed that on the evening of August 15th, he was driving on I-85 and that when he came to Roberts Drive, a white van pulled out in front of him and then police cars later followed. Petitioner implied that the perpetrator of the murder had been in the van.

At this point, Quinlan ended the questioning and Petitioner's wife came in to see him. Petitioner was advised that anything he said to his wife could be used against him. When Petitioner's wife asked him he had done "it," Petitioner replied, "yes, I killed the girl, but I didn't mean to." (T. 618). Captain Quinlan later resumed his conversation with the Petitioner. Petitioner stated that he went to one store where he talked to a woman but stated he could not bring himself to hurt her. Petitioner then stated that he went to a Stop-and-Go store and that the girl there lunged at him. At this point Petitioner became hysterical and the questioning ceased.

Petitioner testified that he was not advised of his rights and that he had been threatened prior to making the statements. He also claimed that all he could remember was being in a Clayton County Hospital and then at Central State Hospital. The trial court ruled, however, that Petitioner had been advised of his rights and that the statements were voluntary.

A witness was presented at trial who testified that Petitioner came into her store earlier in the day on August 15th, and asked her if she was afraid to be there alone. She testified that Petitioner appeared to be nervous and paced around the store for several minutes. The woman's husband also testified at trial and identified the Petitioner as being the man he saw at the store on that date.

Further testimony showed that on August 15th, Petitioner came to the apartment of his in-laws with a cut hand. Petitioner told his in-laws that a man had run him off the

road. He took off his tennis shoes which were bloody and threw a rag into a corner. Petitioner's wife also saw him that evening. He told her his hand had been cut when a man ran him off the road and pulled a knife on him. Petitioner went to a hospital to have his hand treated and told the receptionist he had injured his hand while cutting meat.

Petitioner's wife testified at trial that Petitioner had beaten her on occasion and had pushed her down the stairs once when she was pregnant. She testified that Petitioner was not insane, but that he was smart and had a violent temper. Petitioner's wife also turned a steak knife over to the police after she found it hidden in the couch. Police also obtained a pair of jeans, tennis shoes, a rag and a t-shirt.

Blood scrapings taken from the store, tennis shoes and knife were found to be of the same blood type as the victim and the Petitioner. There was also testimony that prints lifted from the cash register and counter matched those of the Petitioner's palm and fingers.

In the defense presented at trial, Petitioner did not deny the crime, but chose to assert a defense of insanity. Petitioner presented the testimony of Dr. William P. Sapp in support of his defense. Dr. Sapp testified that Petitioner suffered from general brain damage, seizures and was psychotic. He also testified that Petitioner exhibited the four major symptoms of schizophrenia. In Dr. Sapp's opinion, Petitioner was paranoid and had a defective memory. Dr. Sapp concluded that Petitioner was not capable of knowing right from wrong on the date of the crime. The state called Dr. Miguel Bosch in rebuttal. Dr. Bosch testified that Petitioner was not schizophrenic, was not paranoid and was not psychotic. Dr. Bosch did not have an opinion as to whether Petitioner knew

right from wrong on the date of the crime, stating that it was impossible for him to give such an opinion without observing the Petitioner on that date.

Any further facts will be presented as necessary for an explanation of the issues raised by the instant petition.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS COMPLIES WITH THIS COURT'S HOLDING IN SANDSTROM V. MONTANA, 442 U.S. 510 (1979).

Petitioner raises various allegations concerning the holding by the Eleventh Circuit Court of Appeals in relation to the charge of the court. Petitioner asserts that the holding of the court below is in direct conflict with the holding of this Court in Sandstrom v. Montana, 442 U.S. 510 (1979). Petitioner also asserts that there are ambiguities left by the decision of this Court in Connecticut v. Johnson, ___ U.S. ___, 103 S.Ct. 969 (1983) which have resulted in a split in the lower courts. Petitioner also asserts that the jury instructions given are incomprehensible and could be interpreted as shifting the burden of persuasion and also violated his due process right to comprehensible jury instructions. Petitioner asserts that this Court should grant certiorari in this case in light of the recent grant of certiorari in the case of Koehler v. Engle, 52 U.S.L.W. 3279 (1983). Respondent submits that as the decision by the Eleventh Circuit Court of Appeals in the instant case was consistent with the prior holdings of this Court, no need exists for the granting of the petition for a writ of certiorari.

In evaluating any jury instructions, this Court has recognized "in determining the effect of [an] instruction on the validity of [a] conviction, . . . a single instruction may not be judged in artificial isolation, but must be viewed in the context of the overall charge." Cupp v. Naughten, 414 U.S. 141, 146-7 (1973). This Court went further to note, "the

question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Id. at 147. Accord, Henderson v. Kibbe, 431 U.S. 145, 154 (1977). Thus, it is essential to examine the charge as a whole before any analysis can be made as to any potential burden shifting effect of any isolated portions of said charge.

In evaluating the charge, the Eleventh Circuit Court of Appeals set forth the entire instruction on intent in the Appendix to its opinion. The following portions of the charge are pertinent to this Court's evaluation of the instruction as to malice:

> I charge you that a person commits murder when he unlawfully and with malice aforethought either express or implied causes the death of another human being. Express malice is that deliberate intention, unlawfully, to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all of the circumstances of the killing show an abandoned and malignant heart. Malice is an essential element in murder and it must exist before any homicide can be murder. Malice, in its legal sense, is not necessarily ill will or hatred; it is the unlawful, deliberate intention to kill a human being without justification or mitigation or excuse, which intention must exist at the time of the killing. . . .

The law presumes every intentional homicide to be malicious until the contrary appears from circumstances of alleviation and justification, mitigation or excuse. The accused may show such circumstances to the Jury unless such circumstances appear from the evidence produced against the accused. But he is not required to do so. If such evidence produced against the accused, if there be such, discloses the homicide was done without malice, then this presumption that the homicide is malicious does not exits. If, however, the evidence produced against the accused, if there be such, does not disclose the killing was done without malice, the accused may show that it was done without malice. But he is not required to do so.

I charge, you however, that this presumption which arises against the slayer where an intentional homicide is shown does not arise against the slayer unless it be first shown to a moral and reasonable certainty and beyond a reasonable doubt that the Defendant was the intentional slayer. When and if a killing is proved to your satisfaction to be the intentional act of the Defendant himself, the presumption of innocence with which he enters upon the trial is removed from him. But as I charged you heretofore, the evidence of justification or mitigation may be found in the evidence produced

against him. If there be no evidence introduced against him to show justification or mitigation and if the evidence introduced shows the homicide to have been committed as charged in the indictment, the Defendant may, but is not required to, show mitigation or excuse.

Corn v. Zant, supra at 568-9.

The trial court later charged the jury concerning various other elements of the crime, including intent. The court charged as follows:

I charge you that the acts of a person of sound mind and discretion are presumed to be the product of a person's will, but this presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequence of his acts. If such person uses a weapon in a manner in which such weapon is ordinarily employed to produce death and thereby causes the death of a human being, the law presumes the intent to kill. However, this presumption may be rebutted. A person will not be presumed to act with criminal intention, but the trier of the facts, and that is you, the Jury, in this case, may find such intention upon consideration of the words, conduct, demeanor and motive, if any, and all facts and circumstances connected with the acts for which the accused is prosecuted.

Corn v. Zant, supra at 569. The court then charged on reasonable doubt and presented the charge on insanity. After giving the charge on insanity, the court charged,

> I charge you that intention is an essential element of any crime and that the burden is on the State to prove such intention beyond a reasonable doubt. While the burden is not on the Defendant to disprove intention, nonetheless, if he introduces some competent evidence of insanity, which might tend to negate evil intention in the Defendant at the time of the commission of the alleged crime, then the burden falls upon the State to prove beyond a reasonable doubt that the Defendant was sane at the time of the alleged crime, and therefore had the requisite criminal intent.

Id. At the conclusion of the charge on insanity, the court again reiterated that under Georgia law, " a person will not be presumed to act with criminal intent." Id.

Petitioner challenged this charge in two respects. Petitioner first asserts that the charge impermissibly shifts the burden of proof on the element of malice. Secondly, Petitioner asserts that the charge shifts the burden of proof on the question of intent. Petitioner now asserts that the Eleventh Circuit Court of Appeals did not properly apply the principles of Sandstrom v. Montana in making its determination that the charge was constitutional.

In evaluating the charge, the Eleventh Circuit Court of Appeals correctly noted that the instructions in Sandstrom, supra, contained no curative language concerning the fact that the presumption of intent could be rebutted. The jurors in

Sandstrom "were not told that the presumption could be rebutted . . . by the defendant's simple presentation of 'some' evidence; nor even that it could be rebutted at all." Sandstrom, supra, 442 U.S. at 517. In the instant case, the charge made an unequivocal statement that the presumption could be rebutted and went further to state that a person would not be presumed to act with criminal intention. Furthermore, the Eleventh Circuit Court of Appeals concluded the following:

> Moreover, the instructions were clear that the accused "may" show circumstances to negate intent, "[b]ut he is not required to do so," and that he "may" show that the killing was done without malice, "[b]ut he is not required to do so." . . . The charge is replete with cautious explanations that refute Corn's claim that an irrebuttable presumption weighed against him.

Corn, supra at 559.

The Eleventh Circuit also noted that the trial court specifically stated that if the evidence produced against the defendant showed a lack of malice, then the presumption that the homicide was malicious did not exist. The trial court also specifically stated that the presumption did not arise unless it was proven beyond a reasonable doubt that the defendant was the intentional slayer. Thus, the court concluded "at most, there was a permissible inference (footnote omitted) that the defendant could, if he so chose, introduce mitigating evidence." Corn, supra at 559 (emphasis in original).

This Court noted in County Court of Ulster v. Allen, 442 U.S. 140, 156 (1979), that "inferences and presumptions are a staple over our adversary system of factfinding." The test in evaluating a presumption or inference is that "the device must

not undermine the factfinders responsibility at trial, based on the evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." Id.

In evaluating the instructions in the instant case, Respondent submits that the Eleventh Circuit Court of Appeals accurately found that the instructions were fair and balanced and that any "untoward effect any part of the instruction may have had was entirely vitiated by the clear statement of the state's responsibility to prove intent beyond a reasonable doubt." Corn, supra at 560.

Respondent submits that the record clearly shows that the Court of Appeals properly applied the holdings of this Court in concluding that the charge in the instant case created at most a permissive inference and that the charge as a whole did not impermissibly shift the burden of proof to the Petitioner in violation of his constitutional rights. Therefore, as the Eleventh Circuit Court of Appeals properly applied the holdings of this Court in making its determination, no reason exists for this Court to grant certiorari to review the issue.

Petitioner would have this Court grant certiorari to consider issues allegedly left ambiguous in Connecticut v. Johnson, ___ U.S. ___, 103 S.Ct. 969 (1983). Respondent asserts that this Court need not grant certiorari in this case because there is no need to resort to a harmless error analysis. Even though Respondent does assert that no harm resulted from the charge in the instant case and that this Court could conclude that the charge was harmless error, no such analysis is necessary as Respondent asserts that charge was simply not impermissibly burden shifting. Therefore, this does not serve as a basis for the granting of certiorari.

Petitioner has finally asserted that this Court should grant certiorari based on the recent granting of certiorari in the case of Koehler v. Engle, 52 U.S.L.W. 3279 (1983). Once

again, Respondent asserts that the granting of certiorari in that case does not serve as a basis for certiorari in the instant case. In Koehler v. Engle, the Sixth Circuit Court of Appeals ruled that the charge was impermissibly burden shifting and was not harmless error, completely contrary to the ruling in the instant case. Engle v. Koehler, 707 F.2d 241 (6th Cir. 1983). The Eleventh Circuit Court of Appeals in the instant case case complied with the prior holdings of this Court, therefore, this serves as no justification for the granting of the petition for a writ of certiorari.

Therefore, Respondent requests that this Court decline to grant the petition for a writ of certiorari based on the jury charge in the instant case.

II. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL.

Petitioner has challenged the effectiveness of his trial counsel, primarily based on the alleged lack of mitigating evidence presented by trial counsel. Petitioner asserts that counsel should have presented more evidence in mitigation concerning his alleged mental illness.

The Eleventh Circuit Court of Appeals examined the effectiveness of trial counsel. The court determined that all allegations pertaining to the effectiveness of trial counsel were without merit. "The appropriate inquiry is whether the Petitioner was represented by counsel reasonably likely to render and in fact rendered [sic] reasonably effective assistance. . . . Rather than taking isolated instances out of context, we determine whether effective assistance was rendered based on the totality of the circumstances." Corn, supra at 560-561. The court noted that the complaints lodged by Petitioner were primarily matters of trial strategy and, thus,

were the decisions of the attorney. The court noted that the Sixth Amendment did not mean errorless counsel or counsel judged ineffective by hindsight. The court also noted the standard previously set forth in Washington v. Strickland, 653 F.2d 1243 (5th Cir. Unit B 1982) (en banc), cert. granted, ___ U.S. ___, 103 S.Ct. 2451 (1983). The court concluded that Petitioner would have to show, even if his counsel were ineffective, that it worked to his actual and substantial disadvantage. Therefore, the Court concluded "we find that Corn's trial counsel made strategic decisions reasonably calculated to afford effective representation, and Corn has not shown that those choices so prejudiced him as to violate any constitutionally protected right." Id. at 561.

Counsel testified in an evidentiary hearing before the United States Magistrate. It was noted that the only witness testifying on behalf of the Petitioner at the sentencing phase was his mother. Petitioner's wife was called as a state's witness at the sentencing phase. The attorney, Mr. McWhorter, testified that he presumed he could have brought Dr. Sapp back in at the sentencing phase of the trial, but he chose not to do so. (F.H.T. 90). He testified that he did not think Dr. Butcher's opinion would have been helpful at the time. Therefore, it is clear that Mr. McWhorter made a tactical decision concerning the testimony of other witnesses and decided to rely on the testimony presented at the guilt-innocence phase of the trial and the testimony of Petitioner's mother, rather than presenting evidence which he did not feel would be helpful. As this is clearly a tactical decision by counsel, it does not serve as the basis for a claim of ineffective assistance. Therefore, no reason exists for the granting of a petition for a writ of certiorari in the instant

case as the decision by the Eleventh Circuit Court of Appeals finding Petitioner's counsel to be effective does not contradict any decisions of this Court.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Charles Thomas Corn.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mary Beth Westmoreland, a member of the Bar of the Supreme Court of the United States and Counsel of Record for the Respondent, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this date served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing a copy of same in the United States Mail with proper address and adequate postage to:

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This 14 day of December, 1983.

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